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N. 2890

No. 14316

United States
Court of Appeals
for the Ninth Circuit

JULES GARRISON, Appellant,

vs.

WARNER BROTHERS PICTURES, INC., a corporation, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

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INDEX

[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

MORRIS LAVINE,

215 West Seventh Street,
Los Angeles 14, California.

For Appellee:

FRESTON & FILES,
EUGENE D. WILLIAMS,

650 South Spring Street,
Los Angeles 14, California. [1*]

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*Page numbering appearing at bottom of page of original certified Transcript of Record.

In the United States District Court for the Southern District of California, Central Division

Civil No. 12479-BH

JULES GARRISON, Plaintiff,

vs.

WARNER BROTHERS PICTURES, INC., a corporation, DOE CORPORATION, ROE CORPORATION, Defendants.

COMPLAINT FOR BREACH OF CONTRACT

Plaintiff complains and alleges:

For a First Cause of Action:

I.

Plaintiff is now and at all times herein mentioned was a resident of the County of Los Angeles and State of California, and a citizen of the State of California and of the United States of America.

II.

Defendants are and at all times herein mentioned were foreign corporations incorporated under the laws of states other than California. Defendant, Warner Brothers Pictures, Inc., hereinafter designated as Warner Brothers, is and at all times herein mentioned was a corporation incorporated and existing under the laws of the State of Delaware. Defendants at all times herein mentioned were engaged in the business of making and [2] producing motion pictures and in such business maintained, operated and conducted the same in

the County of Los Angeles and State of California, and at all times herein mentioned said defendants were doing business in the County of Los Angeles and State of California.

III.

That the defendants, Doe Corporation and Roe Corporation, are the fictitious names of the defendants, whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered, this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendants" is used in this complaint, it shall include all of the defendants individually and collectively herein sued.

IV.

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000.00) Dollars.

V.

That sometime prior to July 17, 1950, the defendants particularly Warner Brothers did produce, make and cause to be filmed a certain motion picture known as "The Flame and the Arrow" and which motion picture was thereafter distributed by defendants, particularly Warner Brothers, to theatres for public viewing, in the City and County of Los Angeles and elsewhere. That at all times herein mentioned the leading actor or star in said motion picture was a motion picture actor known as Burt Lancaster.

VI.

That on or about July 17, 1950 and for some time prior thereto and thereafter, defendants, particularly Warner Brothers, their servants, agents, and employees in the course of their duties as such and on the business of said defendants, did make and publish and cause to be made and published certain offers to [3] the public by means of motion pictures, newspapers and other publications, which offers related to said motion picture "The Flame and the Arrow" and to the part played therein by said Burt Lancaster, to-wit: That said defendants, particularly Warner Brothers offered to pay the sum of $1,000,000 to anyone who could prove that said Burt Lancaster did not do or perform all of the stunts he was shown doing or purported to perform in said motion picture.

VII.

That plaintiff saw and read the various publications of said offer on or about July 17, 1950 and thereafter, and plaintiff in reliance thereon did gather and check evidence and proof required by said offer and plaintiff did accept said offer and plaintiff did notify defendants, particularly Warner Brothers, and defendants' attorneys of plaintiff's acceptance of said offer and plaintiff did further notify defendants that plaintiff could prove that said Burt Lancaster did not do or perform all of the stunts that he is shown doing or purports to do in said picture "The Flame and the Arrow."

VIII.

That plaintiff pursuant to the aforesaid contract with defendants did offer proof and did submit proof to said defendants, particularly Warner Brothers, in full compliance with said offer of defendants aforesaid and at all times herein mentioned plaintiff was ready, able, and willing to submit further proof and to present further performance pursuant to said offer and acceptance of said agreement.

IX.

That plaintiff has duly performed all of the conditions required by said contract to be performed on his part.

X.

That pursuant to plaintiff's acceptance and performance [4] of said offer and contract, plaintiff made demand upon defendants, particularly Warner Brothers for payment of said sum of $1,000,000 and defendants, particularly Warner Brothers, refused and still refuse to pay said sum of $1,000,000 or any part thereof.

For a Second, Separate and Distinct Cause of Action, Plaintiff Alleges:

I.

Plaintiff realleges and incorporates herein by reference as if fully set forth herein in haec verba all of the allegations in plaintiff's First Cause of Action aforesaid.

II.

That if defendants should claim or allege any failure or lack of performance of said contract on the part of plaintiff, plaintiff alleges that if there be any alleged failure or lack of full performance on the part of plaintiff, such failure, if any, was excused by reason of the waiver and estoppel on the part of defendants in not requiring or requesting or accepting any further performance; that such failure, if any, was further excused by prevention of performance on the part of defendants particularly Warner Brothers; that said defendants accepted plaintiff's performance as full performance; and that defendants' conduct amounted to an anticipatory breach so that no further performance was required by plaintiff; that, in any event, plaintiff did render sufficient and full performance of the aforesaid contract.

III.

That plaintiff is and at all times herein mentioned was ready, able and willing to submit additional proof if necessary or requested under the aforesaid contract.

Wherefore, plaintiff prays judgment against defendants [5] and each of them as follows:

1. For $1,000,000;
2. For costs of suit;

3. For such other and further relief as the Court deems just and proper.

/s/ MORRIS L. MARCUS,
Attorney for Plaintiff. [6]

[Endorsed]: Filed October 30, 1950.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, WARNER BROS. PICTURES, INC., A CORPORATION

Comes Now the defendant, Warner Bros. Pictures, Inc., a corporation and, appearing for itself alone and not for any other defendant, answers the complaint herein as follows:

Answer to First Cause of Action

I.

In answer to Paragraph V, this defendant denies that it did produce, make or cause to be filmed that certain motion picture known as "The Flame and the Arrow," described in the complaint.

II.

In answer to Paragraph VI, defendant denies generally and specifically each and every allegation therein contained.

III.

In answer to Paragraph VII, defendant denies

generally and [7] specifically each and every allegation therein contained.

IV.

In answer to Paragraph VIII, defendant denies generally and specifically each and every allegation therein contained.

V.

In answer to Paragraph IX, defendant denies generally and specifically each and every allegation therein contained.

VI.

In answer to Paragraph X, defendant denies generally and specifically each and every allegation therein contained.

Answer to Second Cause of Action.

I.

Defendant repeats, restates and makes a part hereof each and every denial and allegation made by it in response to the First Cause of Action set forth in the complaint.

II.

Denies generally and specifically each and every allegation set forth in Paragraph II.

III.

Denies generally and specifically each and every allegation set forth in Paragraph III.

Wherefore, this answering defendant prays that

plaintiff take nothing and that it be hence dismissed with its costs.

FRESTON & FILES and
EUGENE D. WILLIAMS,
/s/ By EUGENE D. WILLIAMS,
Attorneys for Defendant,
Warner Bros. Pictures, Inc. [8]

Duly Verified. [9]
Affidavit of Service by Mail attached. [10]
[Endorsed]: Filed March 7, 1951.

[Title of District Court and Cause.]

REQUEST FOR ANSWER TO INTERROGATORIES DIRECTED TO WARNER BROS. PICTURES, INC.

Plaintiff Jules Garrison, pursuant to Rule 33, requests Warner Bros. Pictures, Inc. by any officer thereof competent to testify in its behalf to answer fully and separately in writing under oath each of the following interrogatories, within fifteen days after delivery of the interrogatories unless the court on motion and notice and for good cause shown enlarges the time:

1. What is the name and address of the actor who appeared in the motion picture "The Flame and the Arrow" who is represented to be Burt Lancaster and who, as Dardo, ran up the ladder carrying another person represented to be the boy, Rudi?

2. What is the name and address of the actor who appeared in the motion picture "The Flame and the Arrow" who, as Rudi, is carried up the ladder by Dardo?

3. What is the name and address of the actor who appeared in the motion picture "The Flame and the Arrow" who, as Dardo, [11] ran along the edge of the roof carrying another person depicted to be the boy, Rudi?

4. What is the name and address of the actor who appeared in the motion picture "The Flame and the Arrow" who, as Rudi, was carried along the edge of the roof by Dardo?

5. What is the name and address of the actor who appeared in the motion picture "The Flame and the Arrow", who was represented and purported to be Burt Lancaster, and who, as Dardo, was shown leading a group of horsemen riding hard through a forest in the night?

6. What is the name and address of the actor who appeared in the motion picture "The Flame and the Arrow", who was represented and purported to be Burt Lancaster, and who, as Dardo, was shown driving a chariot or two wheel cart in the market place?

7. What is the name and address of the actor who appeared in the motion picture "The Flame and the Arrow", who was represented and purported to be Burt Lancaster, and who, in fact, shot the particular arrow which actually struck the Hawk, barely missing Rudi's head?

8. What is the name and address of the actor

who appeared in the motion picture "The Flame and the Arrow", who was represented and purported to be Burt Lancaster, and who, as Dardo, was in fact leading the outlaws and actually doing most of the sword fighting at the market place?

9. What are the names and latest known addresses of all stunt men used in the filming of the motion picture "The Flame and the Arrow"?

10. Which are the scenes and what parts were performed by each of the said stunt men in the filming of the motion picture "The Flame and the Arrow"?

11. What are the names and latest known addresses of each stunt man who wore the costume of Dardo in the motion picture [12] "The Flame and the Arrow" and in which scenes did each perform?

12. What are the names and latest known addresses of all wardrobe men and women and make-up men and women who handled the actor or actors who are shown in the motion picture "The Flame and the Arrow" as Dardo?

13. What are the names and latest known addresses of all actors and stunt men who were used in the "Second Unit" on the motion picture "The Flame and the Arrow"?

14. What is the function and use of a "Second Unit" on a motion picture?

15. What was the function and use of the "Second Unit" in the motion picture "The Flame and the Arrow"?

16. What are the names and latest known ad-

dresses of all the camera men and lighting personnel used in the filming of the motion picture "The Flame and the Arrow", setting forth the dates on which said personnel worked and the scenes which they lighted or filmed?

17. What are the names and latest known addresses of all "grips" and movers of equipment in the motion picture "The Flame and the Arrow"?

18. What consideration or compensation has been and will be received by defendant Warner Bros. Pictures, Inc. for its services in connection with the production or distribution of the motion picture "The Flame and the Arrow"?

19. What was the exact language of the offer made by Warner Bros. Pictures, Inc. to the effect that $1,000,000 would be paid to anyone who could prove that Burt Lancaster did not perform all the stunts and feats of strength and skill which he is depicted as having done or purported to have done in the motion picture "The Flame and the Arrow"?

20. By means of how many media, i.e., motion picture trailers, newsreel films, newspaper advertising, radio programs, [13] etc., was said offer made, specifiying particulars of each?

21. When did defendant Warner Bros. Pictures, Inc. first have knowledge of the offer described in interrogatory No. 19?

22. Did defendant Warner Bros. Pictures, Inc. at any time repudiate said offer described in interrogatory No. 19? If the answer to this interrogatory is in the affirmative, state the time, place, circumstances and manner in which said repudia-

tion was made by defendant Warner Bros. Pictures, Inc.

23. Was Burt Lancaster authorized by defendant Warner Bros. Pictures, Inc. to make the offer described in interrogatory No. 19?

24. State names and addresses of all persons who were employed directly or indirectly by defendant Warner Bros. Pictures, Inc. in connection with the advertising and publicizing of the motion picture "The Flame and the Arrow" and the offer referred to in interrogatory No. 19?

25. What are the names and latest known addresses of the wranglers who took care of the horses which were used in the motion picture "The Flame and the Arrow"?

26. What frames or scenes have been cut from the motion picture "The Flame and the Arrow" since its initial public showing?

27. What are the names and latest known addresses of the actors who substituted for Burt Lancaster as Dardo in the motion picture "The Flame and the Arrow", setting forth in detail the scenes and by which persons said substitutions were enacted.

28. What are the names and latest known addresses of all persons who appeared in the motion picture trailer in which an offer of $1,000,000 was made in connection with the motion picture "The Flame and the Arrow"?

29. What is the connection between defendant Warner Bros. Pictures, Inc. and Warner Bros. Newsreel and/or Pathe Newsreel? [14]

30. Does Warner Bros. Pictures, Inc. own or control, or are they in any way connected with Warner Bros. Newsreel and/or Pathe Newsreel?

31. What are the names and latest known addresses of all actors who participated in the rescue of Papa Pietro from the gallows in the motion picture "The Flame and the Arrow"?

32. What is the latest known address of Don Turner?

33. What is the latest known address of Billie Curtis?

34. What are the names and latest known addresses of the expert archer or archers who shot the arrows which actually struck the places shown in the motion picture "The Flame and the Arrow"?

35. In what scenes and in what parts did Don Turner perform in the motion picture "The Flame and the Arrow"?

36. What are the names and latest known addresses of all persons who were used as doubles for Burt Lancaster in the motion picture "The Flame and the Arrow", including the name and scene of each of said impersonations?

37. What was the salary actually received by Don Turner for each day in which he worked on the motion picture "The Flame and the Arrow" setting forth opposite each date the amount received and the exact work which he did on each day?

38. What part did Duke Green perform in the motion picture "The Flame and the Arrow"?

39. What was Duke Green doing at the time

he received his injuries during the filming of the motion picture "The Flame and the Arrow"?

40. How high in fact was Burt Lancaster from the ground when he is shown doing acrobatics along the side of the castle in the motion picture "The Flame and the Arrow"?

41. Were any mechanical devices, props, wires, or men used in the pole stunts shown to be performed by Burt Lancaster in the [15] motion picture "The Flame and the Arrow"?

42. If the answer to the foregoing interrogatory No. 41 is in the affirmative, specify in detail the manner in which said mechanical devices, props, wires or men were used.

43. What was the arrangement and understanding between defendant Warner Bros. Pictures, Inc. and Burt Lancaster with respect to the offer of $1,000,000 made by Burt Lancaster in connection with the motion picture "The Flame and the Arrow"?

44. What are the names and latest known addresses of all film editors and film cutters who worked on the motion picture "The Flame and the Arrow"?

45. Which scenes and frames were cut from the motion picture "The Flame and the Arrow" after its first public showing?

46. When were the scenes and frames cut to which reference is made in the preceding interrogatory?

47. Did defendant Warner Bros. Pictures, Inc.

in any way participate in the cuts referred to in interrogatory No. 45?

48. What are the names and latest known addresses of all of the actors shown in the cuts referred to in interrogatory No. 45?

49. Which frames and scenes in the motion picture "The Flame and the Arrow" were re-shot and substituted after the initial public showing of said motion picture?

March 23, 1951.

MORRIS L. MARCUS,
/s/ By JACOB SWARTZ

Affidavit of Service by Mail attached. [17]

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

REQUEST FOR ADMISSIONS UNDER RULE 36

Plaintiff Jules Garrison, pursuant to Rule 36, requests defendant Warner Bros. Pictures, Inc. to make the following admissions for the purposes of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial; namely, that each of the following statements is true:

1. That the person in the motion picture "The Flame and the Arrow" who is represented and purported to be Burt Lancaster and who ran up the

ladder carrying another person represented to be the boy Rudi in "The Flame and the Arrow" was not in fact, Burt Lancaster.

2. That the person in the motion picture "The Flame and the Arrow" who is represented and purported to be the boy, Gordon Gebert, who plays the part of Rudi in the film and was carried up a ladder was not a boy but was in fact a midget named Billie Curtis. [18]

3. That the person in the motion picture "The Flame and the Arrow" who is represented and purported to be Burt Lancaster, and who ran along the edge of the roof of a church or high building carrying another person depicted to be the boy Rudi in "The Flame and the Arrow" was not in fact Burt Lancaster.

4. That the person in the motion picture "The Flame and the Arrow" who is represented and purported to be the boy Gordon Gebert who plays the part of the boy Rudi in "The Flame and the Arrow" and was carried along the edge of the roof of a church or high building was not in fact a boy, but was in fact a midget named Billie Curtis.

5. That the person in the motion picture "The Flame and the Arrow" who is represented and purported to be Burt Lancaster, and who was shown in said film as leading a group of horsemen riding hard through a forest during night-time, was not in fact Burt Lancaster.

6. That the person in the motion picture "The Flame and the Arrow" who is represented and

purported to be Burt Lancaster, and who drove the two wheel chariot or cart during the fight scene in the marketplace in said film was not in fact Burt Lancaster.

7. That the person in the motion picture "The Flame and the Arrow" who is represented and purported to be Burt Lancaster, and who actually shot the arrow which struck the Hawk, barely missing Rudi's head, in said film, was not in fact Burt Lancaster.

8. That the person in the motion picture "The Flame and the Arrow" who is represented and purported to be Burt Lancaster, and who is doing the sword fighting at the market place shown in said film was not in fact Burt Lancaster.

9. That Burt Lancaster did not do all the feats of strength depicted to have been done by the person known as [19] Dardo in the motion picture "The Flame and the Arrow."

10. That Burt Lancaster did not do all the feats of skill depicted to have been done by the person known as Dardo in the motion picture "The Flame and the Arrow."

11. That Burt Lancaster did not do all the stunts depicted to have been done by the person known as Dardo in the motion picture "The Flame and the Arrow."

In the event Warner Bros. Pictures, Inc. denies the truth of any matter of fact herein requested to be admitted, and plaintiff proves the truth of any such matter of fact, notice is hereby given that plaintiff will apply to the court for an order

requiring defendant Warner Bros. Pictures, Inc. to pay plaintiff the reasonable expenses incurred in making such proof, including reasonable attorneys fees, under Rule 37 (c).

Dated: 23rd March, 1951.

MORRIS L. MARCUS,
/s/ By JACOB SWARTZ

Affidavit of Service by Mail attached. [21]

[Endorsed]: Filed March 26, 1951.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES BY WARNER BROS. PICTURES, INC.

Comes Now the defendant, Warner Bros. Pictures, Inc., a corporation, and makes answer to the interrogatories directed to Warner Bros. Pictures, Inc., compiled herein by plaintiff and dated March 23, 1951, as follows:

Interrogatory No. 1

Answer: Burt Lancaster, whose address is 830 Linda Flora Drive, Los Angeles, California.

Interrogatory No. 2

Answer: Gordon Gebert, whose address is 514 Gaylord Drive, Burbank, California.

Interrogatory No. 3

Answer: Burt Lancaster, address above.

Interrogatory No. 4

If by edge of the roof is meant the lower edge of the roof [22] the answer is Gordon Gebert, whose address is listed above. If by edge of the roof is meant the peak of the roof, the answer is Billy Curtis, whose address is 2314 Orchard Drive, Burbank, California.

Interrogatory No. 5

Answer: Burt Lancaster, address above.

Interrogatory No. 6

Answer: Don Turner, whose address is 3203½ Riverside Drive, Burbank, California.

Interrogatory No. 7

Answer: Burt Lancaster, address above, shot the arrow which appeared in the picture to be shot. The arrow which actually struck the Hawk (assuming by that to mean the character the Hawk) was not shot by any person.

Interrogatory No. 8

Answer: Burt Lancaster, address above.

Interrogatory No. 9

Answer:

Paul Baxley, 15 La Paloma, Alhambra, Calif.; Richard Brehm, 419 Main St., Burbank, Calif.;

Albert Cavens, 3311 Oak Glen Drive, Hollywood 28, Calif.; Bud Cokes, 11554 La Maida, North Hollywood, Calif.; Ben Corbett, 1123 W. 37th Place, Los Angeles 7, Calif.;

Richard Danwill, 1298 Queen Anne Pl., Los Angeles 6, Calif.; James Dime, 8619 Willis Ave., Van

Nuys, Calif.; George Dockstader, 159 Screenland Drive, Burbank, Calif.;

John Epper, 7050 Longridge Ave., Van Nuys, Calif.;

Dick Farnsworth, 3219 Ellington Dr., Los Angeles 28, Calif.;

Matt Gillman, 816 N. Alpine Dr., Beverly Hills, Calif.; William A. (Duke) Green, 4759 Elmer Ave., North Hollywood, Calif.;

Slim Hightower, 13531 Reedley St., Van Nuys, Calif.; Royden Clark, 308 E. Cedar, Apt. A, Burbank, Calif.; [23] Charles Horvath, 1934 N. Highland, Los Angeles 28, Calif.; Clyde Hudkins, 3816 Alameda, Burbank, Calif.; Dick Hudkins, 320 N. Orchard, Burbank, Calif.;

Ed Jauregui, 215 13th St., Newhall, Calif.; Leroy Johnson, 9201 Kewen, Sun Valley, Calif.; Billy Jones, 13443 Van Owen, Van Nuys, Calif.;

Pete Kellett, 10702 Kelmore St., Culver City, Calif.; Fred Kennedy, 233 N. Lincoln Ave., Burbank, Calif.; Harold (Stubby) Kruger, 334½ N. Hollywood Way, Burbank, Calif.;

Walt La Rue, 13120 Magnolia Blvd., N. Hollywood, Calif.; Bert Le Baron, 6720 Franklin Place, Los Angeles 28, Calif.; Carey Loftin, 4066 Rhodes Ave., North Hollywood, Calif.;

Mickey McCardle, 1251 West 45th St., Los Angeles 37, Calif.; Frank McGrath, 1144 N. Vista St., Hollywood 46, Calif.; Frank McMahon, 828 California St., Santa Monica, Calif.; James Magill,

18731 Wyandotte, Reseda, Calif.; Kansas Moehring, 5447 Hollywood Blvd., Los Angeles 36, Calif.; Boyd "Red" Morgan, 14650 Vincennes St., Van Nuys, Calif.;

Artie Ortego, 1330 N. Fairview, Burbank, Calif.;

Ed Parker, 4236 Sherman Oaks Ave., Sherman Oaks, Calif.; Gil Perkins, 10306 Dunkirk Ave., Los Angeles 25, Calif.; Walter Pietila, 833-B 5th St., Santa Monica, Calif.;

Bobby Rose, 5181½ West 20th St., Los Angeles 16, Calif.;

Clint Sharp, 10921 Fairbanks Way, Culver City, Calif.; Jimmy Shaw, United States Marines; Jos. P. Smith, 6526 Woodley Ave., Van Nuys, Calif.; Ray Spiker, 926 Rose St., Burbank, Calif.;

Glenn Thompson, 943 N. Edinburgh, Los Angeles, Calif.; Louis Tomei, 2609 Piedmont, Montrose, Calif.; Don Turner, 3203½ Riverside Dr., Burbank, Calif.;

Dale Van Sickel, 2454 Lyric Ave., Los Angeles 27, Calif.; William (Sailor) Vincent, 4645 Cartwright Ave., North Hollywood, Calif.; [24]

Billy Williams, 541 Western Ave., Glendale 7, Calif.; Terry Wilson, 942 Hammond St., Los Angeles 46, Calif.; Harry Woolman, 501 4th St., Manhattan Beach, Calif.; Al Wyatt, 6723 Beck Ave., North Hollywood, Calif.

Interrogatory No. 10

Answer: Scenes wherein stunt men were used:

Ext. Mountain Pass: Capt. of Guard leads his mounted Hessians and two cart loads of loot. Rocks

start rolling down to block road. Captain discovers Dardo and his friends making the attack. Dardo's men rush in, knock soldiers from their horses hauling carts. Take possession and race away with loot. * * *

Don Turner played the part of the Captain of the Guards with the following stunt men as guards: Frank McGrath, Terry Wilson, Sailor Vincent, John Epper, Ed Juaregui, Charles Horvath.

Extras adjusted for stunts in this scene were: Billy Williams, Artie Ortego, Kansas Moehring, Dick Hudkins, who were riders and part of the band of outlaws.

Ben Corbett played the part of the outlaw who was bulldogged from the cart and Fred Kennedy did the bulldogging.

Ext. Castle Yard: Acts of carnival making entrance to castle gate. Dardo and his troupe appear —and by tricks, make entrance past guards until they are intermingled with carnival acts. Impressario comes out calling for help. As soldiers start to close gate, battle is on. * * *

The following stunt men were used in this scene:

Outlaws: George Dockstader, Ed Parker, Jimmy Shaw, Jos. P. Smith. [25]

Guards: Glenn Thompson, Paul Baxley, Mickey McCardle, Charles Horvath.

Pick-up shots on the same scene were made at a later date using:

Outlaws: Bert Le Baron, George Dockstader, John Epper, Carey Loftin.

Guards: Paul Baxley, Mickey McCradle, Glenn Thompson, Charles Horvath.

Richard Danwill was used at this time in the bear skin.

Int. Dungeon and Kitchen: The bandits are herded into the dungeon. * * * Piccolo and Dardo drop onto guards and subdue them—freeing prisoners. Prisoners are led through the kitchen. * * *

The following stunt men were used in this scene as guards: Duke Green, George Dockstader, Glenn Thompson, Paul Baxley, Mickey McCradle, Terry Wilson.

Extras used in the scene but adjusted for stunts: Jimmy Dime and Bud Cokes.

Int. Castle—Great Hall: This scene is where the carnival acts are going on and Dardo is recognized. Soldiers rush for weapons. Ulrich orders Allesandro arrested, two guards seize Rudi and the melee begins.

Don Turner played the part of a Hessian officer in this scene as well as the following stunt men:

Guards: Terry Wilson, Mickey McCardle, George Dockstader, Glenn Thompson.

Outlaws: Joe Smith, Sailor Vincent, Duke Green, Frank McGrath.

Walter Pietila and Ray Spiker were extras adjusted for stunts as outlaws. [26]

Int. Castle—Great Hall—Castle Corridor and Upper Hall: The sword fight between Dardo and Allesandro was prepared, set up, rehearsed and, in part, photographed with Burt Lancaster, Robert Douglas, Don Turner and Albert Cavens. In this

development of the scene, during the process of rehearsal and preparation, Don Turner frequently doubled Burt Lancaster, and Albert Cavens doubled Robert Douglas, and they sometimes appeared in these respective parts during the shooting of scenes, but in the final make-up of the picture the scenes which appear in the picture show Burt Lancaster himself and Robert Douglas himself staging the fight. Charles Horvath and Glenn Thompson were stunt guards in this scene.

Int. Castle—Great Hall: Retakes and added scenes of the fight. These shots included the following stunt men as soldiers and guards: Ed Parker, Terry Wilson, Sailor Vincent, Glenn Thompson, Don Turner, Paul Baxley, Mickey McCardle, Charles Horvath, Boyd "Red" Morgan.

Int. Anne's Chamber: Dardo and Piccolo climb in window of Anne's chamber. Glenn Thompson acts as guard who fires arrow after Dardo and Piccolo retreat through window.

Ext. Portcullis Tower: Soldier starts to turn wheel to lower the gate. Dardo hits him with his pole, topples him from tower. Dardo then fights. Two more soldiers sway from wheel. Rescue of the prisoners.

This scene included the following stunt men as soldiers: Bert LeBaron, George Dockstader, Mickey McCardle, Joe Smith, Paul Baxley, Carey Loftin.

Ext. Dardo's Retreat: This scene included as townsmen the following stunt men: Charles Horvath, Mickey McCardle, Duke Green (trapped by the snare). [27]

Ext. City St. and Square—Ext. Roof Tops: Escape after capture. Dardo and Rudi make get-away over roofs.

This scene, the latter part of which shows the figure of Dardo carrying Rudi in profile along the top of the roof, was photographed at least twice. In one of the takes Don Turner doubled for Burt Lancaster in the part of Dardo, with Billy Curtis doubling for Rudi. In the other take of this scene Burt Lancaster himself performed the role of Dardo, with Billy Curtis doubling for Rudi. The latter pictures (those which show Burt Lancaster himself) are the ones which were actually used in the picture.

The following six stunt men worked as guards in this scene: Glenn Thompson, Al Wyatt, Charles Horvath, Joe Smith, Terry Wilson, Paul Baxley.

Ext. Piazza: (2nd Unit) Dardo and his band race in on their horses to fight Hessians and rescue Papa Pietro. Dardo jumps to cart, drives it out.

The following stunt men were included in the scene:

Guards: Sailor Vincent, Charles Horvath, Mickey McCardle, Duke Green, Ed Parker, Carey Loftin, Bert LeBaron, Stubby Kruger, James Magill, Frank McMahon, Glenn Thompson, Paul Baxley, Pete Kellett, Billy Jones, George Dockstader, Harry Woolman, Louis Tomei, Jimmy Shaw, Dale VanSickel, Gil Perkins.

Outlaws: Richard Brehm, Matt Gillman, Fred Kennedy, Dick Hudkins, Walt La Rue, Joe Smith, Dick Farnsworth, Slim Hightower, Billy Williams,

Clint Sharp, John Epper, Clyde Hudkins, Frank McGrath, Royden Clark, Leroy Johnson. [28]

This scene also includes as doubles: Don Turner doubling for Burt Lancaster in cart scenes; Bobby Rose doubling for Papa Pietro; Terry Wilson doubling for Mel Archer.

Interrogatory No. 11

Our records show only one stunt man who wore the costume of Dardo * * * Don Turner, address above.

Scenes in which he performed: (a) Escape after capture over city roof tops. (In one take; not used in picture); (b) 2nd Unit shot of Papa Pietro's rescue; (c) Sword fight between Dardo and Allesandro. (In rehearsals and shots not shown in picture.)

Interrogatory No. 12

Answer: Gordon Bau, 4241½ Cahuenga Blvd., No. Hollywood, Calif.; Roy Dumont, 15445 Lassen St., San Fernando, Calif.; Ross Ramsay, 1016 Catalina St., Burbank, Calif.; Fay Hanlon, 4745 Colfax St., No. Hollywood, Calif.

Interrogatory No. 13

Answer: 2nd Unit Shots:

Ext. Mountain Town—Ext. Road: Names and addresses of actors in this scene (no stunt men used): Burt Lancaster, 830 Linda Flora Drive, West Los Angeles, Calif.; Mel Archer, 121 N. Swall Drive, Beverly Hills, Calif.; Robin Hughes, 554 Ramona, Laguna Beach, Calif.; Forrest Matthews, 6007

Lewis St., Dallas, Texas; Alex Sharp, 176 S. Mansfield, Los Angeles 36, Calif. [29]

Ext. Street and Square: Papa Pietro's Rescue. Names and addresses of stunt men used in this scene:

Paul Baxley, 15 La Paloma, Alhambra, Calif.; Richard Brehm, 419 Main St., Burbank, Calif.;

Bud Cokes, 11554 LaMaida, No. Hollywood, Calif.;

James Dime, 8619 Willis Ave., Van Nuys, Calif.;

John Epper, 7050 Longridge Ave., Van Nuys, Calif.;

Dick Farnsworth, 3219 Ellington Dr., Los Angeles 28, Calif.;

Matt Gillman, 816 N. Alpine Drive, Beverly Hills, Calif.; Duke Green, 4759 Elmer Ave., No. Hollywood, Calif.;

Slim Hightower, 13531 Reedley St., Van Nuys, Calif.; Charles Horvath, 1934 N. Highland, Los Angeles 28, Calif.; Clyde Hudkins, 3816 Alameda, Burbank, Calif.; Dick Hudkins, 320 North Orchard, Burbank, Calif.;

Leroy Johnson, 9201 Kewen, Sun Valley, Calif.; Billy Jones, 13443 Van Owen, Van Nuys, Calif.;

Pete Kellett, 10702 Kelmore St., Culver City, Calif.; Fred Kennedy, 233 N. Lincoln Ave., Burbank, Calif.;

Walt La Rue, 13120 Magnolia Blvd., North Hollywood, Calif.; Bert Le Baron, 6720 Franklin Pl., Los Angeles 28, Calif.; Carey Loftin, 4066 Rhodes Ave., No. Hollywood, Calif.;

Mickey McCardle, 1251 West 45th St., Los An-

geles 37, Calif; Frank McGrath, 1144 N. Vista St., Hollywood 46, Calif.; Frank McMahon, 828 California, Santa Monica, Calif.; James Magill, 18731 Wyandotte, Reseda, Calif.;

Ed Parker, 4236 Sherman Oaks Ave., Sherman Oaks, Calif.; Gil Perkins, 10306 Dunkirk Ave., Los Angeles 25, Calif.;

Bobby Rose, 5181½ West 20th St., Los Angeles 16, Calif.;

Clint Sharp, 10921 Fairbanks Way, Culver City, Calif.; Jimmy Shaw, United States Marines; Joe P. Smith, 6526 Woodley Ave., Van Nuys, Calif.;

Glenn Thompson, 943 N. Edinburgh, Los Angeles, Calif.; Louis Tomei, 2609 Piedmont, Montrose, Calif.; Don Turner, 3203½ Riverside Dr., Burbank, Calif.;

Dale Van Sickel, 2454 Lyric Ave., Los Angeles 27, Calif.; Sailor Vincent, 4645 Cartwright Ave., No. Hollywood, Calif.;

Billy Williams, 541 Western Ave., Glendale 7, Calif.; Terry Wilson, 942 Hammond St., Los Angeles 46, Calif.; Harry Woolman, 501 4th St., Manhattan Beach, Calif.

Interrogatory No. 14

Answer: To photograph scenes usually without principal actors appearing therein and occasional participation in trick shots.

Interrogatory No. 15

Answer: Same as Interrogatory No. 14 above.

Interrogatories Nos. 16 and 17

Answer: These interrogatories are not answered

for the reason they involve many days or weeks of work by numerous personnel in tracing the names, addresses and places at which the various personnel were used in the scenes which were enacted or rehearsed at such times, very numerous in quantity and involving a great amount of work which is unnecessary due to the fact that the information sought is relevant only in the most remote degree and the information could not possibly be furnished except by obtaining an extended additional time for the arduous research involved.

Interrogatory No. 18

Answer: Warner Bros. Pictures, Inc. by contract are entitled to receive return of all moneys expended and advanced by it in the making of the picture, together with interest thereon, costs of distribution, the exclusive right to distribute the picture for fifteen (15) years and fifty per cent (50%) of the net profits after recoupment of all production, distribution and advertising costs.

Interrogatory No. 19

Answer: Warner Bros. Pictures, Inc. made no offer to the effect that $1,000,000, or any sum, would be paid to anyone who [31] could prove that Burt Lancaster did not perform all the stunts and feats of strength and skill which he is depicted as having done or purported to have done in the motion picture "The Flame and The Arrow." The Advertising and Publicity Department of Warner Bros. Pictures, Inc. contemplated making an offer in connection with an affidavit signed by ten leading stunt

men appearing in motion pictures who certified to the fact that Burt Lancaster personally performed the following stunts:

1. Executed somersaults and pirouettes from horizontal bar (six in all) twenty (20) feet above the ground, with swing-up from one bar to the other, upstanding on one foot. From last bar he dropped 10 feet to a balcony, where Nick Cravat approached with pole on which he slid to the ground for a grand finale.

2. Climbed up a 25-foot pole balanced on the forehead of Nick Cravat, to finish off in a performance resembling a flag, and so called, professionally, a "flag."

3. From 35 feet in the air walked across a pole in tight-wire fashion from ledge to ledge with no net underneath.

4. Climbed a 30-foot rope, hand over hand.

5. Received Nick Cravat in his arms from high jump and tossed Cravat away in a somersault in swing time.

6. Executed a "three man high" in the company of Nick Cravat and one, with finish off including a lean to ground fall and then a roll over.

7. Various and sundry riding and action stunts in battle scenes and combat encounters, as well as hand-to-hand fight and sword duel with Robert Douglas.

It was intended to make an offer in the following language:

"The producers of 'The Flame and The Arrow' soon to be distributed by Warner Bros. have a

million dollars to give away. [32] The sum is offered to anyone who can prove that Burt Lancaster did not himself perform all the stunts attested to by the stunt men who worked in the picture."

This offer was never made; nor did Warner Bros. Pictures, Inc. ever authorize any person, firm or corporation to make such offer on its behalf.

Interrogatory No. 20

No offer was ever made by Warner Bros. Pictures, Inc., or authorized by it but in a Newsreel picture issued by Warner News, Inc., a Delaware corporation, the following script was used without authority from Warner Bros. Pictures, Inc. by Warner News, Inc., in connection with a picture of Burt Lancaster, counting money and in conversation with certain newspaper reporters:

"In Hollywood, Burt Lancaster counts the one million dollar reward offered by Warner Bros. to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in 'The Flame and The Arrow.' "

Interrogatory No. 21

Answer: Never.

Interrogatory No. 22

Answer: No, except that on inquiry from the plaintiff in this action on or about October 9, 1950, one of the attorneys for Warner Bros. Pictures, Inc. told him that no such offer had been made.

Interrogatory No. 23

Answer: No.

Interrogatory No. 24

Answer: As to the names and addresses of all persons employed directly or indirectly by Warner Bros. Pictures, Inc. in connection with the advertising and publicity of the motion picture "The Flame and The Arrow" the answer is so extensive and would require such considerable research in California, New York and [33] elsewhere that it would put an unusual and unnecessary burden upon the defendant to make answer thereto; to the matter of the making of the alleged offer referred to in Interrogatory No. 19, the answer is that no person was employed directly or indirectly by Warner Bros. Pictures, Inc. to make such offer.

Interrogatory No. 25

Defendant declines to answer this interrogatory for the reason that the question is irrelevant to the issues involved and because it would take an unnecessary amount of time and work and create a great burden upon the defendant to enable it to ascertain the information required by the question without any commensurate advantage to either party.

Interrogatory No. 26

Answer: A "sneak" preview was had at Huntington Park on April 20, 1950. On April 21st and 22nd, 1950 some small trimming, involving principally the removal of a love scene, was taken from the picture. The negative was then sent on April 21 and 23, 1950 to Technicolor where it was put in final form. There was a press preview on June 13, 1950 at Warner Bros. Theatre in Hollywood. The

first public showing was on national release dated July 22, 1950. No cutting, trimming or alteration in the picture was done after April 22, 1950.

Interrogatory No. 27

Answer: Don Turner, address above, driving cart in rescue scene.

Interrogatory No. 28

Answer: No motion picture-trailer of the character described in the question was made.

Interrogatory No. 29

Answer: Warner Bros. Pictures, Inc. is the owner of all the issued capital stock of Warner News, Inc., which produces the Warner-Pathe Newsreel. [34]

Interrogatory No. 30

Answer: Same as Interrogatory No. 29.

Interrogatory No. 31

See answer to Interrogatory No. 10.

Interrogatory No. 32

See answer to Interrogatory No. 6.

Interrogatory No. 33

See answer to Interrogatory No. 4.

Interrogatory No. 34

Answer: Martin Akmagin; address unknown.

Interrogatory No. 35

See answers to Interrogatories Nos. 6 and 10.

Interrogatory No. 36

Answer: Don Turner; address above. Also see answers to Interrogatories Nos. 6, 10 and 11.

Interrogatory No. 37

Answer: Salary for each day Don Turner worked:

Date—Part	Base Rate	Adjustment	O.T.	Total
10-12-49 Actor—"Capt.of Guards"	$ 75.00	$ 35.00	$ 14.07	124.07
Adj. for leading stunt horses				
10-13-49 Cont. of role as Capt. of Guards	75.00	.....	7.03	82.03
10-20-49 Doubling Lancaster	55.00	.....	6.88	.....
Adj. for climbing and running over roof tops	.....	145.00	.....	206.88
10-21-49 Doubling Lancaster in same scene	55.00	.....	.....	55.00
10-27-49 Doubling Lancaster	55.00	.....	.....	.....
Adj. for chases, many falls, fight with spears, etc.	.....	145.00	100.00	300.00
11- 5-49 Hessian Officer	55.00	.....	.....	55.00
11- 7-49 Cont. of role	55.00	.....	.....	
Adj. for stair falls	.....	45.00	.....	100.00
11-29-49-12-15-49 incl. & 12-24-49 Weekly P. R.	350.00	.....	.....	.....
Fencing Instructor per wk.	.....	.....	.....	933.33
12-14-49 Fencing Double for Lancaster	100.00	.....	31.25	131.25
12-15-49 Fencing Double for Lancaster	100.00	.....	25.00	125.00
12-16-49 Stunt Guard	55.00	.....	6.88	61.88

Total Amount Paid.....$2174.44

Note: All rates quoted above, with the exception of the $350.00 figure, which is designated as per the week, are daily rates.

Interrogatory No. 38

Answer: Double for Francis Pierlot who enacted the role of Papa Pietro.

Interrogatory No. 39

Answer: Double for Francis Pierlot, as above.

Interrogatory No. 40

Answer: About 20 feet.

Interrogatory No. 41

Answer: No.

Interrogatory No. 42

Answer: See Interrogatory No. 41 above.

Interrogatory No. 43

Answer: None.

Interrogatory No. 44

Answer: Alan Crosland, 4015 Willowcrest Ave., North Hollywood, Calif.; James Moore, 4034 Alta Mesa Ave., North Hollywood, Calif.

Interrogatory No. 45

Answer: If the "sneak" preview is regarded as a public [36] presentation, the answer appears in response to Interrogatory No. 26. The national release of July 22, 1950 is regarded by the defendant as being the first public showing of this picture. There was no cutting after that date or at any time after April 22, 1950.

Interrogatory No. 46

See Answer to Interrogatory No. 26

Interrogatory No. 47

Answer: Yes.

Interrogatory No. 48

Answer: So far is is known, only Lancaster and the actress who participated with him in the love scene.

Interrogatory No. 49

Answer: None.

PRESTON & FILES and
EUGENE D. WILLIAMS,
/s/ By EUGENE D. WILLIAMS,
Attorneys for Defendant, Warner Bros. Pictures, Inc. [37]

Duly Verified. [38]

Acknowledgment of Service attached. [39]

[Endorsed]: Filed April 6, 1951.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSIONS UNDER RULE 36

In response to plaintiff's Request for Admissions under Rule 36 and subject to any and all pertinent objections as to admissibility which may be interposed at the time of trial, defendant Warner Bros. Pictures, Inc., a corporation, answers as follows:

1. No.
2. No.
3. No.
4. If by the edge of the roof is meant the lower edge the answer is "No;" if by the edge of the roof is meant the crest of the roof the answer is "yes."
5. No.

6. Yes.

7. The person who is represented and purported to be Burt Lancaster, and who shot the arrow which struck the Hawk, was in [40] fact Burt Lancaster; no person shot an arrow which in fact struck the Hawk.

8. No.

9. No.

10. No.

11. No.

Dated: April 5, 1941.

FRESTON & FILES and
EUGENE D. WILLIAMS,
/s/ By EUGENE D. WILLIAMS,
Attorneys for Defendant,
Warner Bros. Pictures, Inc. [41]

Duly Verified. [42]

Acknowledgment of Service attached. [43]

[Endorsed]: Filed April 6, 1951.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial the 21st day of July, 1953, before Honorable Ben Harrison, Judge of the above-entitled Court, sitting without a jury, a trial by jury having been expressly waived. Plaintiff was represented by

Messrs. Sampson & Dryden and Morris L. Marcus, his attorneys; defendant Warner Bros. Pictures, Inc. was represented by Messrs. Freston & Files and Eugene D. Williams, its attorneys.

Evidence was offered and received, the cause argued and submitted to the Court for its decision; and the Court, having fully considered the evidence and the arguments of counsel, now files the following, its Findings of Fact and Conclusions of Law:

Findings of Fact

I.

The Court finds that the defendant Warner Bros. Pictures, Inc., did not produce or make the motion picture "The Flame and the Arrow" described in paragraph V of the complaint herein but it was produced by Norma Productions, Inc., a corporation, under contract with said defendant Warner Bros. Pictures, Inc., and that said motion picture was thereafter distributed by defendant Warner Bros. Distributing Corporation, a corporation, as alleged in said paragraph V of the complaint.

II.

The Court finds that on or about July 17, 1950, the defendant, acting through its Studio Publicity Manager, caused Burt Lancaster to appear at the vaults of a Los Angeles bank, where he was photographed by a motion picture camera and a news reel sequence prepared showing said Burt Lancaster behind the bars in said bank vault in his shirt sleeves purporting to count money, during

which the following dialogue took place between said Lancaster and young ladies who appeared in said picture:

"Lancaster: 999,998,999,999, One million dollars. I had to count it three times to make sure.

Girl: Here he is, ladies.

Rocklin: Hello, Burt, I'm Miss Rocklin of the Los Angeles Mirror.

Lancaster: How do you do?

Rocklin: Tell me, is this really on the level?

Lancaster: Really on the level? Well, so much so that I'm trying to figure how to win it myself.

Marsh: Burt, I'm Marilyn Marsh of International News Service.

Lancaster: How do you do, Ma'am? [45]

Marsh: I just saw you in "The Flame and the Arrow." Now look. You can't make me believe that it was you doing those *summ*ersaults from, what was it, six horizontal bars, 50 feet in the air?

Lancaster: Sixty feet. Why not? Before I got lucky in Hollywood, I used to make my living in the circus. I did stuff like that for coffee and donuts.

Marsh: What happened if you missed?

Lancaster: Somebody got an extra donut.

Helming: I'm Ann Helming of the Hollywood Citizen-News.

Lancaster: Well, hello.

Helming: It's hard to believe that any producer wants to give away a million dollars.

Lancaster: Well, Ann, they really don't want

to give away a million dollars if they can help it. But this is a genuine, bona fide offer.

Helming: What if somebody proves that it wasn't you who walked across the pole 35 feet in the air?

Lancaster: If anybody can prove that, they'll get the million dollars and I'll go back to coffee and donuts. Satisfied?

Rocklin: Sounds good enough for me. Come on, girls, let's take another look at 'The Flame and the Arrow.'"

As prepared by the Publicity Department of Warner Bros. Pictures, Inc., the announcement accompanying said sequence was in the following language:

"The producers of The Flame and the Arrow offer a reward of $1,000,000 to anyone who can prove that Burt Lancaster did not himself perform [46] all the stunts attested to by the stunt men who worked in the picture."

The negative film of said sequence, with the sound track accompanying the same, was sent to Warner News, Inc., a corporation, the stock of which is wholly owned by Warner Bros. Pictures, Inc., with the above introductory language accompanying said negative film and sound track.

Thereafter certain film editors or script writers in the employ of Warner News, Inc., substituted in the place of said introductory language provided by Warner Bros. Pictures, Inc., the following words:

"In Hollywood Burt Lancaster counts the $1,000,-

000 reward offered by Warner Bros. to anyone who can prove that Burt himself did not perform his daring stunts in The Flame and the Arrow."

That thereafter said sequence, including the last quoted introduction, as a part of a news reel, was made public by showing it in various motion picture theatres. That except as herein found no other offers or purported offers in connection with said motion picture, The Flame and the Arrow, were made or authorized by the defendant, and the Court specifically finds that said defendant did not offer to pay the sum of $1,000,000 or any sum to anyone who could prove that said Burt Lancaster did not do or perform all the stunts he was shown doing or purported to perform in said motion picture.

III.

The Court finds that the plaintiff saw the news reel above described and a news item appearing in a newspaper which was offered and received as Exhibit 6 in this case, but finds that it is not true that plaintiff, in reliance thereon or otherwise, or at all, did gather or seek evidence or prove as required by said alleged [47] offer, and the Court finds that the plaintiff did not accept said offer and did not notify the defendants, and in particular the defendant Warner Bros. Pictures, Inc., or the attorneys of said defendant, or either of them, of plaintiff's acceptance of said offer, either as alleged in paragraph VII of said complaint, or otherwise, or at all.

IV.

The Court finds that it is not a fact that the plaintiff pursuant to said alleged contract or otherwise or at all did offer proof or did submit proof to the defendant Warner Bros. Pictures, Inc. either in full compliance with said alleged offer of said defendant or otherwise or at all, and the Court finds that it is not a fact that at all times in said complaint mentioning plaintiff was ready, able or willing to submit further or any proof or to present further or any performance pursuant to said alleged offer and alleged acceptance of said agreement or otherwise or at all.

V.

The Court finds that plaintiff has not duly or at all performed any or all of the conditions required by said alleged contract to be performed on his part.

VI.

The Court finds that plaintiff made demand upon the defendant Warner Bros. Pictures, Inc. for the payment of the sum of $1,000,000.00 but finds that said demand was not pursuant to any acceptance or performance of said alleged offer or contract. The Court further finds that the defendant Warner Bros. Pictures, Inc. refused and still refuses to pay said sum of $1,000,000.00 or any part thereof.

VII.

The Court finds that all and singular the allegations of paragraph II of the Second Separate and

Distinct Cause of Action set forth in said complaint are not true. [48]

VIII.

The Court finds that all and singular allegations set forth in paragraph III of the said Second Separate and Distinct Cause of Action are not true.

IX.

The Court finds that no offer as set forth in the complaint was made by defendant Warner Bros. Pictures, Inc. or for it or on its behalf. It also finds that said alleged offer was in fact expressly withdrawn before plaintiff attempted to accept the same.

X.

The Court finds that Burt Lancaster himself actually performed all his daring stunts shown in the picture, The Flame and the Arrow. The Court finds that the sequence in said picture which showed the character Dardo carrying the character Rudi for about twenty-five feet along the crest of a roof, in the distance and silhouetted against the sky, was actually performed, not by Burt Lancaster, but by one Don Turner, who doubled for Lancaster and who carried a midget. The Court finds that the action so portrayed was not a stunt and was not daring or dangerous. That in the sequence which shows the character Dardo riding into the courtyard on a horse which he brings to a stop, and in which he steps from the horse to the bed of a stationary two-wheeled cart, cuts the rope

by which the character Pietro was suspended, and then drives the horse pulling the cart from the courtyard, was performed by one Don Turner, who doubled in said sequence for Burt Lancaster, but that the action of said sequence did not constitute a stunt, nor was it daring or dangerous. Without limiting the effect of the Court's finding that said Burt Lancaster did personally perform all of his daring stunts in said picture, the Court finds specifically that he did do the entire sequence of the duel in which the character Dardo is shown fighting the character Alessandro, and that the only portions of said sequence which appeared on the screen in which the character Dardo is [49] portrayed by a double, are two shots showing a portion of the shoulder and arm of Don Turner doubling for Lancaster. The Court also finds that said duel sequence was not a stunt and was not daring or dangerous.

Conclusions of Law

And as Conclusions of Law, based upon the foregoing Findings of Fact, the Court finds and concludes:

I.

That no valid offer as set forth in the complaint herein was made by defendant Warner Bros. Pictures, Inc.

II.

That said alleged offer was not accepted by the plaintiff herein nor was any attempt made to accept said alleged offer until after the same had been expressly withdrawn.

III.

That Burt Lancaster himself did perform all his daring stunts in the motion picture The Flame and the Arrow.

IV.

That the sequences shown in the picture The Flame and the Arrow wherein Don Turner appeared as a double for Burt Lancaster were not stunts and were not daring or dangerous.

V.

That plaintiff should take nothing by this action, and that the defendant Warner Bros. Pictures, Inc., should have and recover its costs herein expended.

Let judgment be entered accordingly.

Witness my hand this 30th day of September, 1953.

/s/ BEN HARRISON,
District Judge. [50]

Submitted by:

FRESTON & FILES and
EUGENE D. WILLIAMS,
/s/ By EUGENE D. WILLIAMS,
Attorneys for Defendant.

Approved as to form:

SAMPSON & DRYDEN and
MORRIS L. MARCUS [51]

Acknowledgment of Service attached. [52]

[Endorsed]: Filed September 30, 1953.

In the United States District Court for the Southern District of California, Central Division

Civil No. 12479-BH

JULES GARRISON, Plaintiff,

vs.

WARNER BROS. PICTURES, INC., a corporation, et al., Defendants.

JUDGMENT

The above entitled action came on regularly for trial the 21st day of July, 1953, before Honorable Ben Harrison, Judge of the above entitled Court, sitting without a jury, trial by jury having been expressly waived. Plaintiff was represented by Messrs. Sampson & Dryden and Morris L. Marcus, his attorneys; defendant Warner Bros. Pictures, Inc. was represented by Messrs. Freston & Files and Eugene D. Williams, its attorneys.

Evidence was offered and received, the cause argued and submitted to the Court for its decision, and the Court, having fully considered the evidence and the arguments of counsel, heretofore filed its written Findings of Fact and Conclusions of Law, wherein and whereby judgment was ordered that plaintiff take nothing and [53] that defendant Warner Bros. Pictures, Inc. do have and recover its costs.

Now, Therefore, in consideration of the premises, it is hereby ordered, adjudged and decreed that plaintiff take nothing by this action and that de-

fendant Warner Bros. Pictures, Inc. do have and recover its costs herein expended and hereby taxed at the sum of $498.92* Retaxed at $249.32.

Witness my hand this 30th day of September, 1953.

/s/ BEN HARRISON,
District Judge.

Submitted by:

FRESTON & FILES and
EUGENE D. WILLIAMS,
/s/ By EUGENE D. WILLIAMS,
Attorneys for Defendant.

Approved as to form:

SAMPSON & DRYDEN and
MORRIS L. MARCUS. [54]

* Cancelled in copy.

[Endorsed]: Judgment docketed and entered October 1, 1953.

[Endorsed]: Filed September 30, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION

To Defendant Warner Brothers Pictures, Inc., and Freston & Files and Eugene D. Williams, its attorneys:

You and Each of You Will Please Take Notice that plaintiff will move the above entitled court, before the Honorable Ben Harrison, Judge presiding, in the Federal Building, Los Angeles, Cali-

fornia, at 10 o'clock a.m., or as soon thereafter as counsel can be heard, on Monday, November 2, 1953, for an order amending the Findings of Fact and Conclusions of Law in accordance with the Motion for Amendment and Revision of Findings of Fact and Conclusions of Law, copy of which is served concurrently herewith.

Dated: October 8, 1953.

SAMPSON & DRYDEN and
MORRIS L. MARCUS,
/s/ By JACOB SWARTZ [55]

MOTION FOR AMENDMENT AND REVISION OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, in accordance with the provisions of Rule 52 (b) of the Federal Rules of Civil Procedure, moves the Court for an order that the Findings of Fact and Conclusions of Law entered herein be amended as follows:

1. Finding of Fact I be amended by striking out the present Finding of Fact I and substituting in lieu thereof the following:

I.

The Court finds that defendant Warner Bros. Pictures, together with Norma Productions, Inc., a corporation, made the motion picture "The Flame and the Arrow" under a contract, and after said motion picture was so made, it was distributed by defendant.

2. Finding of Fact II should be amended by striking out the last paragraph thereof on page 4, lines 17 through 26, and substituting in lieu thereof the following: [56]

II.

That thereafter said sequence, including the last quoted introduction, as a part of the news reel, was made public by defendant who showed it in various motion picture theatres.

3. Finding of Fact III should be amended by the addition of a paragraph that the stunts attested to by the stunt men who worked on the motion picture "The Flame and the Arrow" were as follows:

(1) Executed somersaults and pirouettes from horizontal bar (six in all) twenty (20) feet above the ground, with swing-up from one bar to the other, upstanding on one foot. From last bar he dropped 10 feet to a balcony, where Nick Cravat approached with pole on which he slid to the ground for a grand finale.

(2) Climbed up a 25-foot pole balanced on the forehead of Nick Cravat, to finish off in a performance resembling a flag, and so called, professionally, a "flag."

(3) From 35 feet in the air walked across a pole in tight-wire fashion from ledge to ledge with no net underneath.

(4) Climbed a 30-foot rope, hand over hand.

(5) Received Nick Cravat in his arms from high jump and tossed Cravat away in a somersault in swing time.

(6) Executed a "three man high" in the company of Nick Cravat and one, with finish off including a lean to ground fall and then a roll over.

(7) Various and sundry riding and action stunts in battle scenes and combat encounters, as well as hand to hand fight and sword duel with Robert Douglas.

4. Finding of Fact III should be further amended by striking out the language appearing therein and substituting in lieu thereof the following:

III.

The Court finds that at or about the time of the showing of the news reel above described, a news item appeared in the Los Angeles Mirror consisting of a photograph of Burt Lancaster and Mirror reporter, Kendis Rochlen, and the following language underneath the picture:

"$1,000,000 if you can prove Burt
didn't do it

"Things cannot be so bad in the movie business. Warner Brothers offered to give away $1,000,000 today. It is waiting in cash for anyone who can prove Burt Lancaster did not do all the stunts he is shown doing in a new picture. In "The Flame and the Arrow", apparently no drawing room drama, Lancaster performs somersaults from the horizontal bars, walks across a pole 35 feet above ground, and scales walls like a window washer gone beserk."

5. Findings of Fact IV should be amended by striking out the language therein and substituting in lieu thereof the following: [58]

IV.

The Court finds that plaintiff saw the news reel above described and the news item in the Los Angeles Mirror above described and did gather and seek evidence to accept the offer, and the Court further finds that the plaintiff did accept the offer and notified defendant and its attorneys of said acceptance.

6. Finding of Fact V should be amended by striking out the language therein and substituting in lieu thereof the following:

V.

The Court finds that plaintiff submitted proof to defendant in compliance with the terms of said offer and was ready, able and willing to submit further proof pursuant to said offer and acceptance.

7. Finding of Fact VI should be amended by striking out the language therein and substituting in lieu thereof the following:

VI.

The Court finds that plaintiff made demand upon defendant for payment of the sum of $1,000,000 pursuant to said acceptance and performance of the offer and contract. The Court further finds that defendant refused and still refuses to pay said sum of $1,000,000 or any part thereof.

8. Finding of Fact VII should be amended by

striking out the language therein and substituting in lieu thereof the following:

VII.

The Court finds that defendant declined and refused to permit plaintiff to submit further [59] proof of his acceptance of said offer and contract and plaintiff was excused by reason of waiver and estoppel on the part of defendant from submitting further proof to defendant.

9. Finding of Fact VIII should be amended by striking out the language therein and substituting in lieu thereof the following:

VIII.

The Court finds that plaintiff at all times was and is ready, able and willing to submit the proof as part of its acceptance of said offer and contract.

10. Finding of Fact IX should be stricken and the following substituted in lieu thereof:

IX.

The Court finds that the offer above described was made by defendant and that the purported withdrawal of said offer did not take place prior to plaintiff's acceptance thereof.

11. Finding of Fact X should be amended as follows:

(A) By striking out the language at the commencement of said paragraph, on page 6, lines 11 to 13, "The Court finds that Burt Lancaster himself actually performed all his daring stunts shown in the picture, The Flame and the Arrow."

(B) By striking out the language on page 6,

lines 18 and 19, as follows: "The Court finds that the action so portrayed was not a stunt and was not daring or dangerous."

(C) By striking out the language on page 6, lines 25 and 26, "but that the action of [60] "said sequence did not constitute a stunt, nor was it daring or dangerous."

(D By striking out the remainder of said Finding of Fact X commencing with the word "Without" on page 6, line 27, and ending with the word "dangerous" on page 7, line 4, and substituting in lieu thereof:

The Court finds that Don Turner doubled for Burt Lancaster in a portion of the duel scene in which the character Dardo is shown fighting the character Alessandro.

12. Conclusion of Law I should be amended by striking out the language therein and substituting in lieu thereof the following:

I.

The offer set forth in the complaint was made by defendant.

13. Conclusion of Law II should be amended by striking out the language therein and substituting in lieu thereof the following:

II.

The offer was accepted by plaintiff before defendant attempted to revoke the same.

14. Conclusion of Law III should be amended by striking out the language therein and substituting in lieu thereof the following:

III.

That Burt Lancaster did not himself perform all his daring stunts in the motion picture The Flame and the Arrow. [61]

15. Conclusion of Law IV should be amended by striking out the language therein and substituting in lieu thereof the following:

IV.

That the sequences shown in the picture The Flame and the Arrow wherein Don Turner appeared as a double for Burt Lancaster were stunts and were daring and dangerous.

16. Conclusion of Law V should be amended by striking out the language therein and substituting in lieu thereof the following:

V.

That plaintiff should recover from defendant Warner Bros. Pictures, Inc., the sum of $1,000,000 together with his costs expended herein.

Wherefore, plaintiff prays the above entitled Court for an order amending the Findings of Fact and Conclusions of Law in accordance with the terms of this Motion.

Dated: October 8, 1953.

SAMPSON & DRYDEN and
MORRIS L. MARCUS,
/s/ By JACOB SWARTZ, [62]

Acknowledgment of Service attached. [63]

[Endorsed]: Filed October 9, 1953.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Plaintiff, in accordance with the provisions of Rule 59 (b) of the Federal Rules of Civil Procedure and Rule 17 of the local rules of the above entitled Court, moves the Court for an order vacating and setting aside the judgment entered herein and for a new trial on the following grounds:

1. The Findings of Fact are against the weight of the evidence.

2. The Findings of Fact are against the law.

3. Newly discovered evidence material for the plaintiff which he could not with reasonable diligence have discovered and produced at the trial.

4. Insufficiency of evidence to justify the Findings of Fact and Conclusions of Law and judgment in the following particulars:

(A) Finding of Fact I expressly finds that defendant did not make the motion picture "The Flame and [64] The Arrow" whereas the contract between Norma Productions, Inc. and defendant, in evidence as plaintiff's Exhibit No. 7, clearly shows that the defendant was completely in control of the actual making of that motion picture.

(B) Finding of Fact I further finds that the motion picture was distributed by "defendant Warner Bros. Distributing Corporation, a corporation" whereas, in fact, no such defendant was named or appeared in said action; defendant Warner Bros. was the contracting party to distribute the motion picture under the contract in evidence as plaintiff's

Exhibit No. 7; and defendant utilized Warner Bros. Distributing Corporation as its agent in distributing the motion picture and there is no finding anywhere of such agency in the Findings of Fact.

(C) Finding of Fact II that defendant did not offer to pay the sum of $1,000,000, or any sum, to anyone who could prove that Burt Lancaster did not do or perform all the stunts he is shown doing or purported to perform in said motion picture, is contrary to the fair meaning of the evidence immediately preceding it.

(D) Findings of Fact III omits to find the contents of the news item in the Los Angeles Mirror referred to therein. Finding of Fact III that the plaintiff did not rely upon said news reel and news item, nor gather nor seek evidence [65] as required by the offer, nor accept the offer, nor notify defendant or its attorneys of his acceptance is against the evidence which was uncontradicted at the time of the trial.

(E) Finding of Fact IV that the plaintiff did not offer proof to defendant in compliance with the offer and was not ready, able and willing to submit further proof, is against the weight of the uncontradicted evidence at the time of the trial.

(F) Finding of Fact V that the plaintiff did not perform any of the conditions required by the contract is against the weight of the evidence at the time of the trial.

(G) Finding of Fact VI that the demand of plaintiff against defendant for $1,000,000 was not

pursuant to any acceptance or performance is against the uncontradicted evidence at the time of trial.

(H) Finding of Fact VII that it is not true that defendant waived any further performance by plaintiff and is estopped from claiming that plaintiff did not render further performance is against the weight of the evidence.

(I) Finding of Fact VIII that plaintiff was not ready, willing and able to submit additional proof if necessary or if requested, is against the weight of evidence.

(J) Finding of Fact IX that the offer set forth in the complaint was not made by defendant [66] or on its behalf is against the weight of the evidence, particularly in view of the last sentence in the said Finding that this offer was withdrawn before plaintiff attempted to accept it because it is logically inconsistent to find that no offer was made and then to further find immediately thereafter that the offer was withdrawn by the very same defendant.

(K) Finding of Fact X that the activities therein described, performed by Don Turner, a Hollywood stunt man, for Burt Lancaster, did not constitute stunts, is clearly against the weight of the evidence, and the further finding that said stunts were not daring or dangerous is against the weight of the evidence.

5. Errors of law occurring at the trial, namely:

(A) The ruling in substance by the Court that

acts done by agent corporations of defendant were not done by defendant.

(B) The interpretation of the offer in a strained and unnatural manner against plaintiff, when the offer was prepared by defendant, and the plain, reasonable meaning as contended for by plaintiff would give it life. The construction urged by the defendant and adopted by the court was one in favor of defendant and against the plaintiff and made it meaningless and a trick and snare.

6. The violation of Rule 33 of the Federal Rules of Civil Procedure by defendant in giving false answers under oath [67] to Interrogatories submitted to said defendant, namely to Interrogatories No. 10 and No. 11.

7. The violation of Rule 36 of the Federal Rules of Civil Procedure by defendant in giving false answers to Request for Admissions, namely to Request No. 3.

8. Plaintiff believes that in the circumstances and in view of the importance of the points of law involved, a new trial should be granted and consideration given to plaintiff's Amendments and Revisions of the Findings of Fact and Conclusions of Law.

With this Motion for a New Trial is filed a Motion to Amend and Revise the Findings of Fact and Conclusions of Law.

Said Motion for a New Trial will be made and based upon all the pleadings, papers and documents, including exhibits, on file, and the Minutes of the Court.

Wherefore, plaintiff prays that he be granted a new trial of said cause on a date to be provided by the Court.

Dated: October 8, 1953.

SAMPSON & DRYDEN and
MORRIS L. MARCUS,
/s/ By JACOB SWARTZ, [68]

Acknowledgment of Service Attached. [69]

[Endorsed]: Filed October 9, 1953.

[Title of District Court and Cause.]

MOTION FOR ATTORNEY'S FEES AND COSTS UNDER RULE 37(c)

Plaintiff Jules Garrison, pursuant to Rule 37(c) moves defendant Warner Bros. Pictures, Inc. to pay to plaintiff and to his attorney, Morris L. Marcus, reasonable expenses incurred and reasonable attorney's fees in making proof of matters of fact which said defendant denied under oath in response to Request for Admissions filed under Rule 36. Said facts and sworn denials are based upon plaintiff's Request for Admissions, numbers 3, 5, 7, 8, 9, 10 and 11. Plaintiff moves that he and his said attorney be awarded the sum of $25,000.00 for reasonable counsel fees and the sum of $600.00 for reasonable expenses incurred.

This Motion is based upon all of the records, files and pleadings in said action together with the

Affidavits attached hereto and such oral testimony as may be produced at the hearing. [70]

Dated: November 18, 1953.

/s/ MORRIS L. MARCUS,
Attorney for Plaintiff

NOTICE OF MOTION

Please Take Notice That the undersigned will bring the above motion on for hearing before the above entitled court in the courtroom of the Honorable Ben Harrison, Judge Presiding, at the United States District Court, in the Federal Building, City of Los Angeles, State of California, on Monday, November 30, 1953, at 10:00 o'clock a.m. in the forenoon of that day or as soon thereafter as counsel can be heard.

November 18, 1953.

/s/ MORRIS L. MARCUS,
Attorney for Plaintiff

Memorandum of Points and Authorities

I.

Where the defendant has failed to comply with the provisions of Rule 36 concerning the request for admissions, the court shall allow reasonable expenses incurred and reasonable attorney's fees to plaintiff and his attorney.

F.R.C.P. 36.

F.R.C.P. 37(c) [71]

Affidavit in Support of Motion for Counsel Fees and Costs Under Rule 37(c)

State of California,
County of Los Angeles—ss.

Morris L. Marcus, being first duly sworn, deposes and says: That he is attorney for Jules Garrison, plaintiff, in this proceeding; that a Request for Admissions under Rule 36 was duly prepared, served and filed in the above entitled case upon the defendant, Warner Bros. Pictures, Inc.; that in response thereto Warner Bros. Pictures, Inc. filed its Answer to Request for Admissions under Rule 36; that in its said Answer said Warner Bros. Pictures, Inc. made its denial of certain questions in said Request for Admissions, to wit: question numbers 3, 5, 7, 8, 9, 10 and 11; that thereafter plaintiff and his said attorney, Morris L. Marcus, were compelled to incur expenses and to spend a great deal of time and effort in working upon the proof of said facts; that said case came on for trial and plaintiff did produce proof of said facts at the trial of said case; that by reason of said [72] conduct of said defendant, plaintiff and his said attorney did incur the sum of approximately $600.00 as reasonable expenses and plaintiff's said attorney thereby spent approximately 250 hours' of additional time in said case; that reasonable counsel fees by reason of the aforesaid is the sum of $25,000.00.

Wherefore, plaintiff and his said counsel request said sums from defendant Warner Bros. Pictures,

Inc. under Rule 37(c) of the Federal Rules of Civil Procedure.

/s/ MORRIS L. MARCUS

Subscribed and sworn to before me this 18th day of November, 1953.

[Seal] /s/ FLORENCE S. MARCUS,
Notary Public in and for said County and State.
My commission expires October 19, 1957. [73]

Affidavit of Service by Mail attached. [74]

[Endorsed]: Filed November 19, 1953.

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO MOTION FOR COUNSEL FEES AND COSTS UNDER RULE 37(c)

State of California,
County of Los Angeles—ss.

Eugene D. Williams, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant Warner Bros. Pictures, Inc. in the above-entitled action, and makes this affidavit in response to the affidavit of Morris L. Marcus heretofore filed in support of motion for counsel fees and costs under Rule 37(c). That the Requests for Admissions referred to in the affidavit of Morris L. Marcus numbered 5, 7, 8, 9, 10 and 11 were and

each of them was answered truthfully and accurately by the defendant Warner Bros. Pictures, Inc., and that no evidence was offered by the plaintiff or otherwise proving or tending to prove the correctness of the statements made by plaintiff in said numbered Requests for Admissions, but on the contrary, the evidence clearly showed the truthfulness and accuracy of the defendant Warner Bros. Pictures, Inc., answers to such Requests for Admissions. In this connection, affiant states [75] that plaintiff was afforded full opportunity to examine all pertinent records of the defendant Warner Bros. Pictures, Inc. in connection with this case, was given an opportunity to see the motion picture "The Flame and The Arrow" and was also given an opportunity to and did examine such portion of the film of said picture as he desired under apparatus which enabled said plaintiff to slow down, stop and enlarge such frames of said film as he desired. All this was provided counsel for plaintiff prior to the answers by the defendant to said Requests for Admissions and counsel was fully in possession of complete information to the effect that the actor portraying the character "Dardo" in leading a group of horsemen riding hard through a forest during nighttime was Burt Lancaster; that Burt Lancaster did in fact discharge the arrow which purported to strike the hawk and plaintiff was apprised by defendant's answer to Interrogatory No. 7 that no person shot the arrow which in fact struck the hawk; that the person who did the sword fighting in the market place purporting to be

Burt Lancaster was Burt Lancaster; that Burt Lancaster did do all the feats of strength and skill depicted as having been done by the character "Dardo" and that Burt Lancaster did do all of the stunts depicted to have been done by the character "Dardo."

That the person in the motion picture "The Flame and The Arrow" portraying the character "Dardo" in the sequence where "Dardo" carrying "Rudi" is shown in a long shot running along the crest of the roof of a church or high building was not portrayed by Burt Lancaster, but was portrayed by a double, Don Turner. There is, however, another sequence immediately preceding that sequence in which Burt Lancaster in the character of "Dardo" does carry the midget depicting the character "Rudi" along the lower edge of the same roof and therefore in respect of that latter sequence the answer to the Request for Admissions is true, while in respect to the former sequence it is not true. The answer was prepared by affiant only after he had seen the picture several times, had interviewed Allan Pomeroy, the [76] Assistant Director of said picture, the chief film cutter, Billy Curtis the midget, and others who remembered that the scene had been enacted twice and that on one occasion Burt Lancaster had carried Billy Curtis along the crest of the roof, while at another time Don Turner had carried him. It was the then recollection of all persons interviewed by affiant that the scene which was actually used in the final film was that in which Burt Lancaster had portrayed the character

"Dardo" in that particular sequence, and it was only when Burt Lancaster's deposition was taken by plaintiff that both plaintiff and defendant ascertained definitely that Burt Lancaster had not in fact been the one depicted in the film which was used in the picture. The defendant's answer to Request for Admissions No. 3 was honestly made in good faith in the belief that it was accurate. The actual facts in reference to the matter were divulged to the plaintiff and defendant at the time that Burt Lancaster's deposition was taken on January 18, 1952. It is therefore the fact that for approximately one and one-half years prior to the date of the trial the plaintiff and defendant were both in possession of the facts which would be established on trial in reference to the individual who in the character of "Dardo" had carried the character "Rudi" along the crest of the roof in the distant shot referred to.

Affiant therefore states that there were good reasons for the denial by the defendant of Interrogatory No. 3 at the time that said denial was made and that no harm or expense of any character was caused plaintiff for the reason that at least one and one-half years before the trial in connection with the taking of the deposition of Burt Lancaster, plaintiff learned the true facts and by whom they could be proved in respect of that matter.

In this case, the Court held that the action depicted showing the character "Dardo" in a distant shot escaping along the crest of the roof carrying

the character "Rudi" was not in fact a stunt. Consequently, the matter was of no substantial importance as it was [77] actually immaterial who portrayed the action so long as the action did not constitute a stunt.

Counsel refers to the fact that the matter of costs in this case has already been disposed of. On or about the 8th day of October, 1953, defendant served and filed its bill for costs, which was presented to the Clerk of this Court to be taxed on the 12th of October, 1953. Plaintiff filed no cross-bill. On October 23, 1953, the Clerk of this Court taxed the costs at the sum of $498.92. On October 26, 1953, plaintiff made a motion to review the costs as taxed by the Court, which was noticed for hearing on November 9, 1953. On said November 9, 1953, said costs were re-taxed by Order of the Hon. William C. Mathes, Judge of the District Court, by striking therefrom an item of $249.60 for reporter's fees. Throughout all of said proceedings no motion was made by the plaintiff to tax any costs on his behalf. Affiant therefore states that the time for taxing costs for the plaintiff and charging them against the defendant has now passed and that the current motion is too late.

Wherefore, affiant prays that said motion be denied.

/s/ EUGENE D. WILLIAMS,

Subscribed and sworn to before me this 25th day of November, 1953.

[Seal] /s/ EDITH M. AIRES,
Notary Public in and for the County of Los Angeles, State of California.

Submitted by:

FRESTON & FILES and
EUGENE D. WILLIAMS,
Attorneys for Defendant Warner Bros. Pictures, Inc. [78]

Affidavit of Service by Mail attached. [79]

[Endorsed]: Filed November 27, 1953.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 28, 1953. At Los Angeles, Calif.

Present: The Hon. Ben Harrison, District Judge; Deputy Clerk: M. E. Wire. Reporter: J. D. Ambrose.

Counsel for Plaintiff: Jacob Swartz.

Counsel for Defendants: Eugene D. Williams for def't Warner Bros. Pictures, Inc.

Proceedings: For hearing motion of plaintiff for a new trial, filed Oct. 9, 1953.

Attorney Swartz makes a statement in support of said motion.

The Court makes a statement and Orders motion

for new trial denied, and motion to amend findings and motion for attorneys' fees and costs, heretofore submitted, are each denied.

EDMUND L. SMITH,
Clerk,
By MURRAY E. WIRE,
Deputy Clerk. [80]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes Now the plaintiff Jules Garrison and hereby appeals from the whole of that certain judgment entered herein in the above entitled Court wherein it was adjudged that plaintiff take nothing, to the United States Court of Appeals for the Ninth Circuit.

Dated: This 21st day of January, 1954.

/s/ MORRIS LAVINE,
Attorney for Appellant, Jules Garrison [81]

Affidavit of Service by Mail attached. [82]

[Endorsed]: Filed January 21, 1954.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now the plaintiff-appellant in the above entitled cause and designates for inclusion in the record on appeal the complete record and all the proceedings and evidence in the action consisting of the following:

1. Complaint.
2. Answer of Warner Bros. Pictures, Inc.
3. Request for Answers to Interrogatories to Warner Bros. Pictures, Inc.
4. Request for Admissions.
5. Answers to Interrogatories.
6. Answers to Request for Admissions.
7. Findings of Fact and Conclusions of Law.
8. Judgment.
9. Motion for Amendment and Revision of Findings of Fact and Conclusions of Law.
10. Motion for New Trial. [83]
11. Motion for Attorneys' Fees and Costs Under Rule 37(c).
12. Order of December 28, 1953, Denying Motions to Amend Findings of Fact and Conclusions of Law and for New Trial.
13. All Exhibits.
14. Reporter's Transcript of Proceedings on Trial.
15. Notice of Appeal.
16. This designation.

Dated this 4th day of February, 1954.

/s/ MORRIS LAVINE,
Attorney for Plaintiff-Appellant

Affidavit of Service by Mail attached. [85]

[Endorsed]: Filed February 5, 1954.

[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME TO FILE RECORD AND DOCKET APPEAL AND ORDER THEREON

Comes now the plaintiff-appellant in the above entitled cause and moves the court for an order extending the time to file the record and docket the appeal for the following reasons:

The court reporter has given two estimates as to the cost of the transcript, one where leave is secured to prosecute the appeal on a typewritten record and the other in the event that the record will be printed which is considerably more costly. That consent to proceed on a typewritten record has not yet been secured and it may be necessary or desirable to print the entire record. The plaintiff personally has not sufficient funds to pay for the costs of the printing of the record but such funds will be secured from other sources. That at least three weeks additional time will be necessary to determine whether the case will proceed on a typewritten record or printed record and that the court

reporter will need at least thirty additional days within which to get out the transcript. [86]

Wherefore, plaintiff-appellant prays for an order extending the time an additional fifty days for the filing of the record and the docketing of the appeal.

/s/ MORRIS LAVINE,
Attorney for Plaintiff-Appellant

ORDER

Good cause appearing from the foregoing Motion;

It Is Ordered that the time for filing the record and docketing the appeal in the above entitled cause be, and it hereby is, extended to and including April 20, 1954.

/s/ BEN HARRISON,
United States District Judge [87]

[Endorsed]: Filed March 1, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 87, inclusive, contain the original Complaint; Answer; Request for Answer to Interrogatories; Request for Admissions; Answer

to Interrogatories; Answer to Request for Admissions; Findings of Fact and Conclusions of Law; Judgment; Motion for Amendment of Findings of Fact and Conclusions of Law; Motion for New Trial; Motion for Attorney's Fees and Costs; Affidavit in Opposition to Motion for Attorney's Fees and Costs; Notice of Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for December 28, 1953 which, together with the original exhibits and the Reporter's Transcript of Proceedings, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and seal of said District Court this 16th day of April, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk,

/s/ By THEODORE HOCKE,
Chief Deputy

In the United States District Court for the Southern District of California, Central Division

No. 12479-BH—Civil

JULES GARRISON, Plaintiff,

vs.

WARNER BROS. PICTURES, INC., a corporation, DOE CORPORATION and ROE CORPORATION, Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, Tuesday, July 21, 1953

Honorable Ben Harrison, Judge Presiding.

Appearances: For the Plaintiff: Morris L. Marcus, Esq.; Sampson & Dryden, by Lowell L. Dryden, Esq., and Jacob Swartz, Esq. For Defendant Warner Bros. Pictures, Inc.: Freston & Files and Eugene D. Williams, Esq. [1*]

Tuesday, July 21, 1953, 10:00 a.m.

The Court: Case on trial.

The Clerk: 12479, Jules Garrison vs. Warner Bros. Pictures for trial.

Mr. Dryden: Ready for the plaintiff.

Mr. Williams: Ready for the defendant.

Mr. Dryden: If the Court please, at this time we are going to, with the Court's permission, show the newsreel which the plaintiff contends is part

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* Page numbering appearing at top of page of original Reporter's Transcript of Record.

of the offer and it has been suggested by counsel, again with the Court's approval, that the film can, at the conclusion of the hearing be marked as an exhibit and returned to Warner Bros. with the understanding it will be returned to the Court any time the Court so desires. Is that agreeable?

The Court: That is satisfactory.

Mr. Dryden: Then for the purpose of the record, we will ask that the newsreel——

The Court: As I understand these films are very volatile and should be kept in some fireproof vault. Is counsel willing to stipulate they may be returned subject to the further order of the Court in the case of an appeal.

Mr. Williams: Yes, your Honor, and the same stipulation we are prepared to ask for in the case of the picture itself, which is nine cans of film. I understand counsel are agreeable [3] to that.

Mr. Dryden: That is correct.

Mr. Williams: And if during the course of the trial it should be desired by either counsel or the Court that any part or all of either of the films should again be shown in court we will produce them on an hour's notice.

Mr. Dryden: I believe we have a further stipulation, your Honor, to the effect that this newsreel that is about to be shown, together with the nine cans of film constitute the actual portrayal that was shown to the public in the theatres.

Mr. Williams: That is correct. May I sit over here?

The Court: You are only going to show that part of the newsreel that pertains to this case?

Mr. Williams: Yes. In fact that is all we have. The rest of the newsreel in which this appeared was, in the course of business, destroyed, but this was retained for the purposes of this case. With your Honor's permission I will get over here and get a seat in the audience.

The Court: So long as you pay an admission fee it will be all right.

Mr. Williams: I have already paid my fee, your Honor.

Mr. Swartz: Is that camera angle visible to your Honor?

The Court: What is that?

Mr. Swartz: Is that angle of the screen all right for [4] your Honor?

The Court: It is all right so far as I am concerned.

The Projectionist: Is the Court waiting on me?

The Court: Yes.

The Projectionist: I didn't know. Shall we shut off the lights?

(The lights of the courtroom were shut down and the newsreel was run.)

Mr. Dryden: At this time, if the Court please, we would like to offer the can containing the film just shown to your Honor as Plaintiff's Exhibit 1.

The Court: It will be marked Plaintiff's Exhibit 1, subject to the stipulation heretofore made.

(The article referred to was marked Plaintiff's Exhibit 1, and was received in evidence.)

Mr. Dryden: Now, at this time we are going to ask that the projectionist show your Honor the film The Flame and the Arrow, and if it will be of any assistance to the Court I can point out the scenes that the plaintiff is particularly interested in in this matter, if that will be of any assistance.

The Court: Counsel, I want to know the parts you claim are not bona fide.

Mr. Dryden: That is what I am referring to, your Honor. There are a number, and I will take them in the order of [5] *of* sequence they are shown.

The first one, and the one that is not so important as the later ones, is the sequence showing the shooting of the hawk or the falcon while the bird is in flight.

The next one in the sequence of events which follows the shooting——

The Court: Can't we slow the camera down at these particular points, so that I can get a better understanding of the sequences?

Can you slow it down in any way?

The Projectionist: Yes, I can slow it down to a certain extent. Of course, I can't slow it down too much. Of course, the sound will be off, but you are not particularly interested in the sound.

Mr. Dryden: So that your Honor can follow it, the next one is the sequence where the character Dardo, who is portrayed by Burt Lancaster in many of the scenes, is in the court yard at the time the falcon comes in on his horse with the

two ladies, one of whom is the mother of Rudie, and Rudie being Dardo's son.

At that time, after Burt Lancaster or Dardo shoots this hawk or the falcon, as he may be described, the villain Ulrich, orders the soldiers to seize the character Dardo, and at that time there is a scuffle that occurs there, at which time Dardo, the leading man, and generally portrayed [6] by Burt Lancaster, is shown going up to a roof with his son. His name is Gebert, I believe, and he is the character Rudie in the picture.

Then there is the sequence where the soldiers are chasing them across the top of this pointed roof. Now, that particular sequence we contend, your Honor, and the important one in this litigation, is portrayed by Don Turner, a stunt man, who is carrying with him a midget by the name of Billie Curtis, Don Turner portraying the character Dardo, which is generally the lead portrayed by Burt Lancaster and Billie Curtis, the midget, portraying the character of Rudie, the son of Dardo.

The next sequence and I may be mistaken—I don't have this exactly in mind, but in any event there is a sequence in which a character by the name of Papa Pietro is about to be hung by reason of the instructions in effect from the villain Ulrich.

Dardo is in the forest with his henchmen and they undertake to rescue Papa Pietro, who is about to be hung, and they mount on horseback and they have made up home-made spears, as they have no better equipment, those spears consisting of sap-

lings with the various limbs cut off so that it gives them spears.

The sequence we are particularly interested in is that sequence where they come into the courtyard to rescue Papa [7] Pietro and the character Dardo at that time is portrayed, we contend, by Don Turner in the hand to hand fighting that occurs there with the saplings. And further where he jumps up and cuts Papa Pietro loose into the ox cart and then flees the scene of the purported or prepared hanging with Papa Pietro.

That is described in the sequence as the character Dardo and we contend that was Don Turner in that sequence.

The next one in the sequence of events is, of course, the duel between Allesandro, who is for all purposes a henchman of Ulrich, the villain, and he engages in an extensive duel with Dardo in the castle at which time Allesandro is killed by the character Dardo and in that sequence likewise, we likewise contend it is played by Don Turner.

I think that covers it. Oh, yes, there is one thing I overlooked. While he is doing that there is also some sequences in here with relation to acrobatics that were performed by the character Dardo and we do not contend that the acrobatics as such were not performed by Burt Lancaster but we contend the nature of the film as shown to the public indicated that these acrobatics were being done at a great height and that actually the filming of the picture was done through mirrors and

the acrobatics as such were being done at a relatively low height thereby decreasing the hazard.

(Whereupon the motion picture was shown.)

The Projectionist: It is going to be a slow process, each reel.

Mr. Dryden: If the Court please, the sequence about to start in this second roll of film relates to the endeavor to seize the son, Rudie, and the flight across the roof that I referred to in the original instance.

The projectionist tells me that he can run that through at a normal pace, and then can stop it and run it through at a slower pace. If the Court wants me to give him that instruction, I will do that.

The Projectionist: I can't change the pace very much. This machine is almost a fixed speed.

The Court: We can find out after I see it.

Mr. Dryden: At the conclusion of the sequence over the top of the roof, if you will stop it, Mr. Projectionist, and we will find out what the Court desires.

The Projectionist: All right.

(The portion of the film referred to was projected.)

Mr. Dryden: If the Court please, the only part of that sequence we contend was played by a double is the sequence, camera right to camera left, running across the top of the roof.

The Court: I think you had better play it over again, and slower, and you stand over there, and point out what you claim. [9]

The Projectionist: How many feet do you want to go back,—about 100 or so? I am not trying to be technical, but I want to know.

Mr. Dryden: I can't say, but approximately where the boy is thrown up on the roof after they get away.

The Court: It only takes a minute for the whole thing.

The Projectionist: I think we might as well re-thread the whole thing, if that is satisfactory.

The Court: Yes.

The Projectionist: I can apply some friction to the fly-wheel, and slow this down quite a bit at any time you wish.

(The portion of the film referred to was re-projected.)

(Changing reels.)

The Court: How much longer is it going to be?

The Projectionist: There are nine reels; this is the third.

Mr. Williams: May I suggest, I think the sound is very low. I can't hear it at all.

The Court: That isn't really an issue in the case.

Mr. Williams: Except you get an idea of what the picture is about.

The Court: It might be entertaining but we are not here for entertainment purposes.

Mr. Williams: I know that. This is only about the [10] fourteenth time I have seen the picture. I am just curious to see what it is like.

(Operat*ing* changing reels.)

The Court: How near are you through? How many reels is that?

Mr. Dryden: What reel was that?

The Projectionist: 2-B, the fourth reel, the fourth single reel.

The Court: How many did you say there were?

The Projectionist: Five more on the table.

Mr. Dryden: There is no way, at least that I know of, your Honor, that we can select these to save your Honor's time. I have read the transcript——

The Court: Are there any more stunts from now on?

Mr. Dryden: Yes, there are several scenes relating to the stunts insofar as we are concerned. I don't know what can they are in and therefore I can't exclude them. I will just have to ask your Honor to bear with me in that respect.

The Court: We will take one more reel and then recess until this afternoon.

(The film referred to was projected.)

The Court: We will take a recess until 2:00 o'clock. That is about halfway through?

The Projectionist: Just about, yes. [11]

The Court: How much longer is it going to take? Another hour?

The Projectionist: I would say another hour. We have probably 48 minutes of film to run, and it will take me about four minutes to change reels.

The Court: We will take a recess until 2:00 o'clock. I am going to ask counsel: How do you

expect me to figure from these pictures what is fake photography and what is real.

Mr. Dryden: Your Honor, with relation to the sequences I have pointed out, and will point out, we will have testimony here with relation to those sequences, and how they were actually filmed, and who the characters were that portrayed themselves.

(Whereupon, at 11:45 o'clock a.m. a recess was taken until 2:00 p.m. of the same day.)

Tuesday, July 21, 1953, 2:00 p.m.

The Court: Proceed, gentlemen.

Mr. Dryden: If the Court please, this next scene is the one that we contend was performed by Don Turner, the stunt man, in the fight that took place in the court yard, in the rescue of Papa Pietro.

(The projection was continued.)

Mr. Dryden: It was that sequence there, beginning with the drive into the court yard, including the cutting down of Papa Pietro, and that scene is one we claim to have been performed by a stunt man in the character Dardo.

(The projection was continued.)

The Projectionist: This is the last reel coming up.

The Court: That's too bad.

Mr. Dryden: If the Court please, this next sequence, we contend the sword fight between Dardo and Alessandro is played by a stunt man or an extra, instead of Mr. Lancaster.

(The projection was continued.)

Mr. Dryden: Particularly, this next sequence, your Honor, with relation to the arrow shot by the character Dardo, we contend that was not made by him, but was made by a double.

(The projection was continued.)

Mr. Dryden: Now, in this next sequence, your Honor, we [13] contend that the acrobatics performed here were performed by Lancaster, but that these are the glass shots that I referred to, that distort the picture with relation to depth and distance.

(The projection was continued.)

The Court: Do you dispute that Lancaster performed that last stunt, counsel?

Mr. Dryden: No, we do not dispute that.

The Court: I didn't think you would miss that, anyhow.

Mr. Dryden: We certainly don't dispute it, so far as we are concerned, your Honor.

Now, at this time I would like to offer in evidence the nine reels.

The Court: I think it was stipulated this morning that they would be in evidence, and would be retained by Warner Brothers.

Mr. Dryden: That would be what number?

The Clerk: Plaintiff's No. 2, the nine reels of the picture.

(The articles referred to, marked Plaintiff's Exhibit No. 2, were received in evidence.)

Mr. Dryden: Does the Court desire to take a recess while I assist this man to get his equipment out of here?

The Court: I wondered if you wanted to take the equipment out of here. There may be certain stunts they may want [14] to play again. I would like it out of the way while we take the evidence, of course; that is, out of the Court's view, but it may be on some of these stunts that they may want to rerun them.

We will take a recess of five minutes at this time, so that you can get the room so that you can see the witnesses.

(A short recess was taken.)

The Court: I want it understood when I say a five-minute recess around this courtroom I mean five minutes. That applies to counsel, the bailiff and everybody else. You may proceed.

Mr. Dryden: Call Mr. Evelove.

ALEX EVELOVE

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Alex Evelove.

The Court: Gentlemen, as I understand this case, it really should be divided into two parts, first, whether or not Mr. Lancaster performed the stunts here and, secondly, whether there was an offer and I think inasmuch as you have started first with the picture that we had better take up and complete that phase of the case.

Mr. Dryden: Then I will ask permission to withdraw this witness because he has nothing to do with that particular [15] aspect.

(Testimony of Alex Evelove.)

The Court: I was wondering how counsel would like to handle that. Of course if there is no offer by Warner Bros. we are not concerned with the other.

Mr. Dryden: That is right.

The Court: And if there was an offer, why, then we are concerned with the other.

Mr. Dryden: Well, I thought perhaps in this situation it would be good to continue the continuity of events. Of course your Honor was kind enough to let us put this on out of order. As you saw, a good deal of equipment was necessary.

So far as I am concerned I would recommend that we go into the question of the offer.

The Court: That is satisfactory.

Mr. Dryden: And resolve that issue.

The Court: Do you have any objection?

Mr. Williams: I have no objection either way, your Honor.

Direct Examination

Q. (By Mr. Dryden): Mr. Evelove, will you state your occupation?

A. My present occupation is that of a free lance publicity agent.

Q. Directing your attention back to 1950 and prior thereto, what was your occupation?

A. Studio publicity director for Warner Bros.

Q. And at the time that the picture The Flame and the Arrow was made for how many years had you been director of publicity for Warner Bros. Studio? A. In 1950 it was nine years.

(Testimony of Alex Evelove.)

Q. Nine years? A. Yes, nine years.

Q. Now, your function in that respect was to publicize pictures that were about to be shown by Warner Bros. Studio?

A. Publicize the products of the studio and people under contract to the studio.

Q. And likewise any pictures that were being distributed through the studio, is that correct?

A. Yes, sir.

Q. Now, with relation to the particular film involved here, The Flame and the Arrow, did you have charge of the publicity as related to that picture?

A. I executed that publicity, yes.

Q. And relative to the question of this particular reward that has been referred to, where did you first receive your instructions relative to publicity relating to that factor?

A. From our New York office.

Q. That is the New York office of Warner Bros. Studios as such? [17]

A. Warner Bros. Pictures, Inc., yes.

Q. That was communicated to you either in writing or by——

A. I don't remember the exact method of transmission but it would have been by teletype, telephone or correspondence.

Q. And in that respect were you instructed by Warner Bros. to concentrate on the aspect of Burt Lancaster having done the stunts in that particular picture?

(Testimony of Alex Evelove.)

A. We had started before that particular stunt to publicize the fact that Mr. Lancaster did perform his acrobatic stunts.

Q. I see. And then subsequent to publicizing that the question of offering a reward was suggested to you by the New York office of Warner Bros., is that correct?

A. That was to focus attention further on the campaign we had already started to prove that he did those things.

Q. And with relation to that particular publicity, that was prepared in your department at Warner Bros. Studio, is that correct?

A. Yes, sir.

Q. And directing your attention to the newspaper stories relating to the reward offered in this picture, was that likewise prepared under your direction? A. The releases were prepared.

The Court: That is calling for a conclusion of the witness. [18] Couldn't you show him the newspaper clippings and ask him about those. I have a couple of them that were furnished to me.

Mr. Williams: There is a difference between a newspaper clipping and a news release.

The Witness: That was the point I was going to make.

Mr. Williams: Clippings are not prepared by the publicity man. Those are prepared by some newspaper reporter.

The Court: I simply want to know if he furnished any of this information.

(Testimony of Alex Evelove.)

Mr. Williams: He furnished what is known as the press release. As to those matters we agree with your Honor they should be shown to the witness and identified.

The Court: Well, if they have the press release. Have you?

Mr. Williams: Yes.

Mr. Swartz: May I have the clippings, your Honor, please?

The Court: You can have these two.

(The documents were handed to counsel.)

Q. (By Mr. Dryden): Mr. Evelove, I want to show you what purports to be a photograph and a newspaper, and ask you if you have ever seen that before.

A. I don't know what newspaper it is from.

Mr. Williams: I can't hear you, Mr. Evelove.

The Witness: Oh, I see it now, however, it is from the [19] Mirror. I have seen the story.

Q. (By Mr. Dryden): Was that story that is set forth in the Mirror one of the—I believe you call them plants, so far as publicity is concerned?

Mr. Williams: That is objected to, if your Honor please, on the ground that the story that appears in the newspaper is obviously written by the newspaper. We have handed counsel——

The Court: I don't know whether they are or not, counsel. A good many people write up their own articles.

Mr. Williams: I don't know of any newspapers that publish them.

(Testimony of Alex Evelove.)

The Court: I have read a good many that other people have written, and they have admitted it.

Mr. Williams: We have no objection to his asking this witness whether he read that, but saying, "Is this one of your plants?"

The Court: I will agree with you on that.

Mr. Dryden: All right. Let me reframe the question.

Q. (By Mr. Dryden): Was the continuity as set worth in that article in the Mirror prepared out there at Warner Brothers Studio?

A. I can't answer the question as it is worded.

The Court: How about the photograph there?

The Witness: The photograph is provided by the studio, [20] yes. That was made in a vault of the Bank of America, I believe, in Culver City, at the time the newsreel was shown.

I may be able to explain that all publicity departments, publicity agencies, trying to get news into newspapers and magazines, prepare releases and copy, and that copy is then sent to the desired outlet. And, first of all, the press agent hopes it will be run substantially as sent, and he waits until the paper comes out to find out whether it did.

As I remember the original piece of copy which we did release, there is a variance in language in this particular newspaper's version of it.

Q. (By Mr. Dryden): You refer to a variance. Would you indicate in what respect?

(Testimony of Alex Evelove.)

The Court: Why not have that release? Why not submit the release?

Mr. Dryden: May I have this marked for identification, your Honor, as Plaintiff's Exhibit 3?

The Court: Yes.

The Clerk: Plaintiff's 3, for identification.

(The document referred to was marked Plaintiff's Exhibit 3, for identification.)

Q. (By Mr. Dryden): With relation to that Plaintiff's Exhibit 3, for identification, subsequent to your seeing that photograph and that article, did your department ever take any steps to repudiate that article? [21]

A. Not that I know of.

Q. Now, I show you here what purports to be a release, and ask you if you will identify the five typewritten sheets, and tell us what they are.

Mr. Williams: May I say that I think counsel was inadvertently in error. I don't think that purports to be a release. I think it purports to be several releases.

Mr. Dryden: All right. Thank you.

The Witness: This top sheet is an original release, or, rather, a carbon of an original release in connection with the offer, and I think that an examination of the copy as it appeared here and in the Mirror will show the discrepancies.

Q. (By Mr. Dryden): Now, take a look at the second sheet, and I will ask you if you recognize that? A. Yes, I do.

Q. And will you look at the third sheet?

(Testimony of Alex Evelove.)

A. Yes.

Q. Is that a release?

A. That is a release.

Q. From the studio?

A. From the studio.

Q. All right. And the fourth sheet?

A. Well, that is the same as the first one.

Q. I see.

A. It is a different copy of it. [22]

Q. You have examined all five of these sheets, and you recognize them as being released or duplicate releases, for lack of a better description, that came out of the publicity department of Warner Bros. Studio, relating to this movie; is that correct?

A. Yes. As a matter of fact, this one (indicating) was one of the earliest ones, if I remember correctly.

The Court: Will you put a number on it, counsel? Is that No. 2?

Mr. Dryden: This would be No. 4.

The Court: Then mark it No. 4.

The Clerk: Do you want it marked Exhibit No. 4?

The Court: No, just have it numbered there.

Mr. Williams: I understood the number your Honor referred to was the number on the pages?

The Court: Yes, the number on the pages.

Mr. Dryden: I see. I will number the pages.

Q. (By Mr. Dryden): Now, it appears that you were referring to page No. 2?

A. Yes, pages 2 and 3 are actually the same

(Testimony of Alex Evelove.)

story in two versions, a short and a long, and they preceded the page 1 copy by a couple of weeks, and it was our first item following the affidavit which had been signed by all of these veteran so-called stunt men.

Mr. Dryden: All right. I would like to offer this in [23] evidence, the five sheets.

Mr. Williams: May the fifth sheet be taken out? There is no necessity for the fifth sheet. He said that is a copy of the first sheet.

Mr. Dryden: All right. Then I will offer in evidence the four sheets, and return the fifth sheet.

The Court: They will be introduced as one exhibit.

The Clerk: Exhibit 4.

(The documents referred to were marked Plaintiff's Exhibit 4, and were received in evidence.)

[ee page 307.]

Q. (By Mr. Dryden): Now, with relation to the question of the newsreel, was it contemplated by your department that you would publish a newsreel that would relate to this reward relative to Burt Lancaster in the picture The Flame and The Arrow? A. Yes, we did.

Q. And in accordance with that, did you prepare a newsreel continuity to be used in that newsreel? A. Yes, we did.

Q. Now, I show you here what purports to be a newsreel script, which has been marked Plaintiff's Exhibit 3, for identification, in a deposition,

(Testimony of Alex Evelove.)

and ask you if you recognize that as being the newsreel continuity prepared by your department at Warner Bros. studio here locally?

A. No, I do not. [24]

Mr. Williams: May I look at that just a moment? This was in connection with the deposition of a different witness.

Mr. Dryden: All right.

Mr. Williams: However, if you please, counsel, in order to save you time and trouble, I have the copies of the newsreel scripts that were produced by this witness at the time his deposition was taken.

Mr. Dryden: All right.

Mr. Williams: And which I am sure he can identify.

(The documents were handed to counsel.)

Q. (By Mr. Dryden): I will show you here what purports to be a newsreel script. It says, "O.K.ed by Mr. Ombringer 7-11-50." Do you recognize that as being the original transcript that was produced?

A. Yes, this is the original.

Mr. Dryden: All right. We will offer that in evidence as Plaintiff's next in order.

The Clerk: Exhibit 5.

(The document referred to was marked Plaintiff's Exhibit 5, and was received in evidence.)

[See page 311.]

Q. (By Mr. Dryden): Now, with relation to

(Testimony of Alex Evelove.)

this newsreel, after it was published and released for publication, you had occasion to observe it, did you not? A. Yes, I did.

Q. Will you take a look at this document that is [25] captioned, "Actual newsreel script," and I will ask you if you recognize that as being the continuity and the dialogue that was used, and the actual script that was released to the public?

Mr. Williams: Just a moment, if your Honor please. In order to save confusion I have that particular document marked as an exhibit which was made an exhibit at the taking of the deposition of this particular witness.

I think it would be easier for the witness to identify this one rather than the one that counsel is now producing, which is another copy from the deposition of another witness.

Mr. Dryden: Are these identical copies?

Mr. Williams: I don't know as to that because I wasn't present when you took the deposition to which that was attached, but the one that I have now produced, which is attached to the deposition of—which was identified at the taking of the deposition of Mr. Evelove, is the one which the studio produces as the correct manuscript.

Mr. Dryden: Thank you, counsel.

Q. (By Mr. Dryden): I now show you in accordance with Mr. Williams' recommendation, a document captioned "Actual Newsreel Script." Do you recognize that as being the continuity of the

(Testimony of Alex Evelove.)

dialogue of the script that was actually released in the Warner Bros. newsreel scenes?

A. I don't remember word for word what the newsreel [26] copy had or the dialogue. I remember——

The Court: Do you know, Mr. Williams?

Mr. Williams: Yes, I know.

The Court: Why can't that be stipulated?

Mr. Williams: I shall be very happy to stipulate to it.

Mr. Dryden: I will accept the stipulation and offer this as plaintiff's next in order.

Mr. Williams: I may say that this was produced by having a stenographer take the language from the newsreel and transcribe it.

The Court: That we saw this morning?

Mr. Williams: Yes.

The Court: It will be received.

The Clerk: Plaintiff's Exhibit No. 6.

(The document referred to, and marked Plaintiff's Exhibit No. 6, was received in evidence.)

[See page 313.]

Q. (By Mr. Dryden): Now, Mr. Evelove, as I understand it the purpose of this publicity relative to the reward and the continuities prepared by your department, were for the purpose of convincing the public that Burt Lancaster had done all of his own stunts in this film, is that correct?

A. We wanted to prove that perhaps not since Douglas Fairbanks had there been an actor who

(Testimony of Alex Evelove.)

could do the acrobatic stunts that Mr. Lancaster can do and that was the whole purpose [27] of the campaign.

Q. And that was to prove that he himself had done them rather than someone else, is that correct?

A. That is right. And the film was photographed, as I remember, so that the camera would be on Mr. Lancaster when he did the acrobatic stunts so that the publicity and the stunts and everything would jibe.

Q. Now as I understand it, insofar as the preparation, at least, of the original transcript was concerned, in working with Warner Bros. publicity department you considered that to be a bona fide offer with relation to the reward that was set forth?

Mr. Williams: If your Honor please, that is objected to as calling for a conclusion and speculation on the part of the witness and is not relevant nor material to the case.

The Court: Well, I think the objection is good, what he intended, so far as that is concerned. The publicity speaks for itself, counsel.

Mr. Dryden: Probably so, your Honor. Thank you.

The Court: I don't think his expression as to what he intended would be material. It might be falsely represented.

Q. (By Mr. Dryden): In other words, when this publicity was released you didn't intend it to be a joke or anything of that nature? You con-

(Testimony of Alex Evelove.)

sidered it to be a legitimate representation? [28]

Mr. Williams: That is objected to, if your Honor please, as not relevant to the issues involved in the case and calling for conclusions and speculation on the part of the witness and is immaterial.

Mr. Dryden: In the interrogatories they take the position, as I gather, that it was never intended——

The Court: Counsel, I don't know. I may be wrong in my approach to this case, but it seems to me it is immaterial whether he was joking or not. If he was fooling the public when making such an offer, whether it was a joke or not, and somebody took it up, why, I don't care how much he was joking. They can put out joking advertising if they want but they may have to pay for it.

Mr. Dryden: All right.

Mr. Williams: If your Honor please, it goes farther than that. It is neither the intention of the offerer or the offeree undisclosed that counts. It is the language of the offer and the acceptance.

The Court: That is what I understand. If they made an offer and it was accepted——

Mr. Williams: Regardless——

The Court: Regardless of the purpose?

Mr. Williams: Yes. Incidentally, before we proceed, may I interrupt to this extent? Was this last script which was marked as a transcript, which was described as a transcript [29] of the actual newsreel, was that marked and received in evidence?

(Testimony of Alex Evelove.)

The Court: Yes.

Mr. Files: Was that Exhibit 6?

The Clerk: That is right.

Q. (By Mr. Dryden): Now, Mr. Evelove, you saw the newsreel that was published when it was returned here from New York, isn't that correct?

A. Yes, sir.

Q. And you listened to the continuity of that newsreel as it was portrayed to you, isn't that correct? A. Well, I saw the newsreel, yes.

The Court: Where are the newsreels prepared? Are they prepared in New York?

The Witness: Yes, sir. They are filmed all over the country and all over the world but they go into New York for editing and from there they are distributed to the subscriber theatres.

The Court: In this particular newsreel, did you send the material to New York yourself?

The Witness: Yes; we shipped the film footage and the copy which reproduced the original release on the offer, the language.

The Court: And sent it to the New York office?

The Witness: Sent it to the New York office, yes. [30]

The Court: What office?

The Witness: The newsreel office. I don't remember the address. Warner-Pathe News.

Q. (By Mr. Dryden): Did you send it to Warner-Pathe News or send it to Warner Bros. in New York and they in turn delivered it to Warner-Pathe?

(Testimony of Alex Evelove.)

A. The usual procedure is to send the newsreel footage to the newsreel office with a wire and also a covering wire to Warner Bros. publicity department in New York so they would know it was there.

Q. Then so far as you know in this situation, this was sent to Warner Bros. newsreel and a copy sent to Warner Bros. theatres, is that correct?

A. As a matter of fact I know it was because the newsreel photographer did the actual shipping. I believe he took it to the airport and he put the copy and the transcript in the proper language and shipped it to New York himself.

Q. Then did you have a man arrange—did you arrange for a man to come out here from Warner Bros. newsreel to take the actual pictures here of Burt Lancaster? A. Yes, we did.

Q. And then he shipped the film and the copy on back? A. That is right.

Q. So you know that the copies went both to Warner Bros. newsreel and Warner Bros. Inc.?

A. Yes. Pardon me, I don't know that copies went to Warner Bros. Pictures, Inc. I know that the newsreel man sent the material to the newsreel company and our wire to the home office was usually to the extent that such and such a subject has been shipped to the newsreel company.

The Court: You say "usual." Do you know whether this was done in this case? Say yes or no. Do you know?

(Testimony of Alex Evelove.)

The Witness: I can't say for a fact one way or the other, sir.

Q. (By Mr. Dryden): Now, insofar as this Warner Bros. newsreel is concerned, you are familiar with that organization as it relates to Warner Bros. Theatres, aren't you?

Mr. Williams: Now just a minute.

The Witness: Yes.

Mr. Williams: We are perfectly willing to stipulate and agree as to what the relationship between the two companies is and as to the names of the companies, which have been misstated by counsel. But I certainly object to this witness giving his speculation as to what——

The Court: You say you can stipulate. What can you stipulate to?

Mr. Williams: We have already stipulated to it in our interrogatories but the answer is that this newsreel—the Warner-Pathe Newsreel is put out, prepared, made and put out by a company called Warner News, Inc., which is a wholly [32] owned subsidiary of Warner Bros. Pictures, Inc. In other words, Warner Bros. Pictures, Inc. owns the entire issued capital stock of Warner News, Inc.

We have stated that in response to an interrogatory. That is the fact and there is no need of taking any time with it.

Mr. Dryden: What about the officers, counsel? Can we stipulate as to the relationship of the officers?

(Testimony of Alex Evelove.)

Mr. Williams: I think Mr. Mornay (phonetic) is president of Warner News, Inc. There is a vice-president and secretary also. I don't know of any of those officers who are officers of Warner Bros. Pictures, Inc.

Mr. Dryden: Are any of the Warner Brothers as such officers of Warner Bros. Pathe News?

Mr. Williams: No, no. Warner News, Inc. I understand that none of them are officers.

The Court: Gentlemen, there has been a question if it is all right to take these films back to Warner Bros. We don't want them in this building. They are too dangerous to have around.

Mr. Dryden: We agreed subject to your approval with relation to the equipment.

The Court: I understand they can be back here in an hour or so.

Mr. Williams: We can have them back in an hour any time. [33] May we have the man take them out now without inconveniencing the Court? I think he has a small truck here.

The Court: Yes.

(Films removed from the courtroom.)

The Court: You may proceed.

Q. (By Mr. Dryden): Now, you state that at the time that this newsreel was returned to Los Angeles, relating to this offer, you observed that, is that correct?

A. I saw the newsreel, yes.

Q. And you saw it at the Warner Bros. Pictures, Inc. studio, is that correct?

(Testimony of Alex Evelove.)

A. That is right.

Q. And after observing that and listening to that continuity did you make any change in the continuity as it was then given by the newsreel?

A. I don't—I am quite sure I didn't notice the language of the newsreel.

Q. Well, the question that I am putting to you is this: Were there any changes made from the continuity that was sent back on that newsreel from Warner News, Inc. to Warner Bros. here in Hollywood before it went out to the public?

A. No, sir.

Q. Was there ever any change made with relation to that continuity that was sent out with the newsreel from [34] Warner News, Inc. to Warner Bros. Pictures, Inc.?

A. Not to my knowledge.

The Court: Gentlemen, I haven't read the answers to the interrogatories. They haven't been introduced in evidence. But as to the nature of this publicity and the handling of it to the publicity department, can't those steps be stipulated to?

Mr. Williams: I think they are all set forth in the answers to the interrogatories, your Honor.

The Court: They are not in evidence and I was just wondering about them. They are asking questions of this witness that it seems to me the defendant in this case should know what the facts are.

Mr. Williams: Certainly, and so far as they are facts we are willing to stipulate to them.

(Testimony of Alex Evelove.)

The Court: I was wondering if you couldn't cover at least some of these facts by stipulation rather taking the time to question the witness and build up a large transcript for this reporter.

Mr. Williams: I have no objection to making a large transcript for the reporter but I trust the Court would just as soon save a little time.

The Court: Of course your client pays the bill.

Mr. Williams: You know, I was nourished and educated on court reporter fees so I have to have a soft spot in my [35] heart for a court reporter.

The Court: I have, too, but I have got something else to do besides listen to questions and answers that there is no dispute about.

Mr. Williams: I am sure, your Honor, if counsel will ask us to do so I haven't the slightest doubt but what we can stipulate to many of these facts and save time.

The Court: Are these matters all covered by interrogatories?

Mr. Williams: Yes, they are all covered.

Mr. Dryden: No, they are not.

The Court: Then why don't you introduce the interrogatories into evidence?

Mr. Swartz: Some of them we don't want introduced and some of them we do. I would say this, that Mr. Williams is a very busy man and your Honor will recall I made diligent effort to try to get a stipulation from Mr. Williams over a period of three years. He said he would put it

(Testimony of Alex Evelove.)

in the pre-trial stipulation with the rest and we can try it out.

If he wants to tell us that we can stipulate I will make further effort to do so.

The Court: I have found out from experience that Mr. Williams doesn't stipulate to anything unless he has to.

Mr. Williams: I only stipulate when I believe it to be a fact and when counsel asks us to stipulate to something [36] that I do not believe to be a fact I decline to stipulate.

The Court: I know but——

Mr. Williams: As to this matter, I have already placed the answer in my answer to the interrogatory.

The Court: But they are not in evidence.

Mr. Williams: If counsel will propose a stipulation and if I think it is correct I will agree to it—if I don't I won't agree to it.

The Court: What do you expect to prove by this witness?

Mr. Dryden: I expect to prove that he was the publicity director of Warner Bros. Pictures, Inc.; that in conjunction with the publicity relating to this picture and on behalf of Warner Bros. Inc. and at the direction of the New York office, the plan was conceived wherein and whereby they would offer a reward of $1,000,000 to any person viewing the film that could prove that all of the stunts were not performed by Burt Lancaster.

I proposed to prove by him insofar as I can, that

(Testimony of Alex Evelove.)

Warner News, Inc., as has been stipulated, is a wholly owned subsidiary of Warner Bros.; that they are for all practical purposes, one and the same identity and that under this procedure these films are sent to Warner News, Inc., returned to them, at which time in his capacity as publicity director he heard the continuity as it went to the public; that there was no change made in the continuity or the reward offered in the continuity [37] and it was released to the public with the identical language that was used as returned to them by Warner News, Inc.

Mr. Williams: I can't stipulate to that.

The Court: We will proceed. Proceed, gentlemen.

Mr. Williams: I can stipulate to some of the facts.

The Court: What facts can you stipulate to?

Mr. Williams: I cannot stipulate to conclusions. The facts that I am able to stipulate to, your Honor, I can give your Honor in concise language by referring to certain paragraphs in the answers to the requests for admissions, if your Honor will give me just a moment to do that.

The Court: Well, let us proceed with the evidence, counsel. I am not going to wait around. You can't get any stipulation out of Mr. Williams. I have been trying for three years in this case to get down to a point where we could simplify the issues but I haven't had any co-operation at all.

Q. (By Mr. Dryden): Mr. Evelove, it is true,

(Testimony of Alex Evelove.)

is it not, that when this newsreel is returned to you by Warner News, Inc., that you review it and then it is released to the public?

A. That is not true, sir. I do not review it, if I understand the term "review."

I look at it as an established fact as everyone else in the studio does when it comes in, which is two or three days after it has already been released in the East.

Q. Let me interrupt you one second. As you get the [38] continuity it comes back here to the West Coast within two or three days subsequent to its release in the East? A. Yes.

Q. And at that time you listen to it and observe it, is that correct, at the studio?

A. I look at it, yes, sir.

Q. And that is part of your job as publicity director, isn't that correct?

A. It was not part of my job. I probably could not have looked at the newsreel at any time but I was interested in looking at them.

Q. In this particular case you did look at them?

A. Yes.

Q. And then that was released for local distribution here in Los Angeles without any change or alteration in the continuity as it was returned to you, is that correct?

A. May I explain distribution of newsreels so far as I understand them here?

Q. I am talking about Los Angeles. I would

(Testimony of Alex Evelove.)

like to confine myself to this newsreel in Los Angeles.

A. That is what I am talking about. The exchange, which is the distribution center for film, gets the newsreels from New York and distributes them immediately on receipt, to theatres. It is possible that at the studio we will not get a release until it has already gone into the local [39] theatres, the Los Angeles theatres, that is, so I can't tell for a fact whether I saw it on the day when it had already opened in the first run theatres here or two or three days later.

Q. In any event you saw it very close to the time that it was released here for distribution?

A. I saw it within the approximate week, yes.

Q. And subsequent to that there was no change of any kind or character made in any of this continuity, was there?

A. No, not that I know of.

Q. Now, who else was with you at the time that you observed this newsreel?

A. I don't remember that.

Q. And you don't recall at this time whether it was a day or two before it went to the public or perhaps the same day or a day after?

A. It couldn't have been a day or two before. It could have been the same day it went to the public or a little later but not in advance.

Q. How long did that newsreel, with relation to this million dollar reward, run to the public?

A. I can't answer that. They usually play out

(Testimony of Alex Evelove.)

within a month because of the obvious news elements in the newsreel.

Q. Do you recall how long it was before the picture The Flame and The Arrow was released for publication after [40] you saw the newsreel?

Mr. Williams: I object to that. I don't think that is material.

The Court: Of what materiality is that, counsel? Hasn't he testified to everything, so far as materiality is concerned, as to the publicity?

I might say that I have read this script of this newsreel and also this ad that appeared in the Mirror, and I don't see any place in there where Warner Bros. has offered any reward. You will notice the very peculiar wording. They intimate that there is a reward there, but there is nothing that Warner Bros. offered a reward. It talked about Burt Lancaster offering a reward, and I think it shows a picture of him in the Bank vault.

Did you have that picture taken?

The Witness: Yes, we shot that picture in the bank at the time of the newsreel, when the motion pictures were made.

Mr. Dryden: That is the actual newsreel script, in that actual newsreel that went out, and the first thing that was said was:

"In Hollywood, Burt Lancaster counts the one million dollar reward offered by Warner Brothers to anyone who can prove that Burt Lancaster himself didn't perform his daring stunts in The Flame and The Arrow." [41]

(Testimony of Alex Evelove.)

In the newsreel shown to your Honor, that exact continuity "one million dollars reward offered by Warner Brothers" was there, without reference to anybody else.

The Court: Counsel, that raises another point that I had in mind, and that is as to the publicity that Warner Bros. did, what evidence is there that Warner Bros. have offered any reward?

Mr. Dryden: Well, as I see it, your Honor——

The Court: It is your contention because the publicity department authorized them to so advertise, that they are bound by it? Is that your contention?

Mr. Dryden: Yes, to this extent, the publicity department of Warner Bros. authorized this advertisement of an offered reward, and they sent it to the wholly-owned subsidiary, who prepares it and sends it back, and it was all done, as the evidence will show, all of these pictures of Lancaster, and everything were taken out there by Warner Bros. studio.

I think the testimony will show, so far as Mr. Lancaster is concerned, he was making the offer, as he understood the script, on behalf of Warner Bros. studio, and that they went out there and had it done. He was taken out there by Warner Bros., and the whole thing was done that way.

The Court: You may proceed. I understand what you are driving at now. [42]

Mr. Dryden: Just one last question, if the Court please.

(Testimony of Alex Evelove.)

Q. (By Mr. Dryden): As the publicity director there, after this newsreel came out, did any of the executives of Warner Bros. Theatres, Inc. give you any instructions with relation to changing that continuity?

A. Warner Bros. Theatres, Inc.?

Mr. Dryden: Warner Bros. Theatres, Inc.

Mr. Swartz: That is Warner Bros. Pictures, Inc.

Mr. Dryden: Warner Bros. Pictures, Inc.?

The Witness: No.

Mr. Dryden: I believe that is all the questions I have of this witness.

Mr. Williams: No questions, your Honor.

The Court: That is all.

(Witness excused.)

The Court: The next witness.

Mr. Dryden: Your Honor, at this time I would like to call Mr. Lancaster with relation to interrogatories I want to put to him on the limited matter that relates to the offer.

BURT LANCASTER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: [43]

Direct Examination

The Clerk: You spell your name B-u-r-t?

The Witness: B-u-r-t.

The Clerk: And L-a-n-c-a-s-t-e-r?

(Testimony of Burt Lancaster.)

The Witness: That's correct.

Q. (By Mr. Dryden): Mr. Lancaster, this picture, The Flame and The Arrow, was made at Warner Bros. studio here in Burbank; is that correct? A. That's right.

Q. And I believe you are one of the officers or executives of this Norma Productions; is that correct? A. Yes, it is.

Q. What is your exact title there?

A. I am vice-president of the corporation.

Q. In that capacity, were you aware of the fact that the picture, as such as financed by Warner Bros.? A. Yes, it was.

Mr. Williams: Your Honor, that is objected to as wholly immaterial to the issues involved in this case.

The Court: I don't know whether it is or not, counsel.

Mr. Williams: As a matter of fact, I may say, your Honor, it goes into a matter involving the interpretation of a written instrument.

The Court: I can't hear you. [44]

Mr. Williams: It goes into a matter involving the interpretation of a written instrument, a written agreement, and I don't think the Court is going to be assisted or aided any by this witness' conclusions as to what the effect of the contractual relations between the parties are.

The Court: That is true, but it gives me a general background of what this thing is about. I am in the dark.

(Testimony of Burt Lancaster.)

Mr. Williams: I can say very frankly, your Honor, so far as it may be at all relevant, this picture was made under what is called a production-distribution release, under the terms of which the picture was produced by Norma Productions, Inc., a corporation, of which Mr. Lancaster was, as he says, an officer. It was produced in the Warner lot, using Warner facilities, and financed by Warner Bros., under an agreement by which the picture would be distributed by Warner Bros. for a period of 15 years. They would have the exclusive right of distribution for 15 years. They would have a right to collect all money from distribution, —that is, Warner Bros. Distributing Corporation would collect its distribution fee, the cost of distribution would be paid, the costs of production would be repaid to Warner Bros., and after all those costs had been repaid, the balance, if any, would be divided fifty-fifty between Norma Productions, Inc. and Warner Bros. Pictures, Inc.

Those were the terms, so far as it may have any relevancy, [45] under which this picture was made.

The Court: What difference would it make in this case whether Warner Bros. distributed this picture, or who did it?

Mr. Williams: I don't think it makes any difference, but I say those are the facts, and if counsel wants to stipulate to that effect, all right.

Mr. Dryden: Yes, your Honor, I would be willing to accept for the record the statement of Mr.

(Testimony of Burt Lancaster.)

Williams, subject to any amplification that might be made, without taking any more time.

I would like to ask him with relation to the question of who paid for the publicity costs with relation to this picture?

Mr. Williams: The publicity was one of the costs which was deducted and repaid before there was any net profit divided. In other words, in effect, the picture paid for the publicity.

Mr. Dryden: And was that likewise one of the costs, as it related to the charges for this newsreel of Warner news?

Mr. Williams: I don't know anything about charges on the newsreel. That is another matter, and that comes from a different corporation entirely.

Mr. Dryden: All right. [46]

Q. (By Mr. Dryden): Mr. Lancaster, you recall the day when you went out here to the Bank of America relative to counting out a million dollars?

A. Well, I don't recall the day, but I can remember going out there.

Q. You remember the incident. You recall at that time that the arrangements with you to go out there were made by the Warner Bros. publicity department? A. Yes.

Q. And you were transported out there in company with other members of the Warner Bros. publicity department; isn't that right?

A. That's correct.

(Testimony of Burt Lancaster.)

Q. Now, with relation to the script or any part of the script that you had there, had you ever seen that prior to the day it was delivered to you, when the picture was made?

A. Not to my knowledge. The first time I saw the script, as I recall, was at the bank.

Q. And that script was presented to you by Warner Bros. publicity department; isn't that correct? A. Well, by a member of it.

Q. Particularly, with relation to your tour throughout the country publicizing this particular picture, on all of those occasions you were either in contact with or met a [47] member of Warner Bros. Theatres, Inc. in the publicity department; isn't that right? A. Yes.

Mr. Dryden: Or Warner Bros. Pictures, Inc., I am referring to.

Mr. Williams: I think the witness answered your question, and if you meant Warner Bros. Pictures, Inc., I think he would have answered it differently.

Q. (By Mr. Dryden): Well, let me ask this question: In so far as the publicity men were concerned, you met them in the various cities you publicized this picture, and recognized them as being from Warner Bros. Pictures, Inc. in the publicity department?

A. I don't know if they were connected with Warner Bros. Pictures, Inc. or Warner Bros. Theatres. I don't know if there is such a thing as

(Testimony of Burt Lancaster.)

Warner Bros. Theatres, except I have heard the name. They were men in the city.

The Court: Counsel, was there any question that that was to be considered as a cost of publicity? Naturally, the picture has to be publicized, and Warner Bros. were interested in the publicity and had charge of it. Is there any question? I say "Warner Bros."

Mr. Williams: The publicizing of the picture in the course of distribution was done by Warner Bros. Theatres, Inc. and by Warner Bros. Distributing Corporation. [48]

The Court: Well, they are all a part of Warner Bros.?

Mr. Williams: They were a wholly-owned subsidiary.

The Court: So far as we are concerned, they are all one company?

Mr. Williams: I don't agree to that, but I am giving you the facts as to what companies they were. They are wholly-owned subsidiaries of Warner Bros. Pictures, Inc.

Mr. Dryden: Could you give us the wholly-owned subsidiaries? There is the Warner Bros. Pictures, Inc.

Mr. Williams: That is the parent company.

Mr. Dryden: Then you have the Warner Bros. News, Inc. That is the news company?

Mr. Williams: That is correct.

Mr. Dryden: And there is Warner Bros. Distributors, Inc.; is that correct?

(Testimony of Burt Lancaster.)

Mr. Williams: Warner Bros. Distributing Company.

Mr. Dryden: Company, Inc. And there is Warner Bros. Theatres, Inc.?

Mr. Williams: Yes.

Mr. Dryden: And all of them are wholly-owned subsidiaries of the parent company?

Mr. Williams: All except the parent company are wholly-owned subsidiaries of the parent company.

Mr. Dryden: All right. I will agree to that.

Then maybe we can expedite the time here. [49]

Were all of these various wholly-owned subsidiaries connected with this picture in one way or another, as it related to production, or distribution, or share in the profits?

Mr. Williams: No, sir.

Mr. Dryden: Which ones in so far as the distribution? Was the Distribution Company connected with the picture?

Mr. Williams: Warner Bros. Distributing Company distributed the picture. Warner Bros. Theatres, Inc. financed the production of the picture —I mean Warner Bros. Pictures, Inc. financed the production of the picture. Warner Bros. Theatres, Inc. show the picture in some of its theatres. Warner News, Inc. had nothing to do with the production, distribution or showing of the picture.

The Court: May I ask this question: Was the publicity put out by the distributing company or by the parent company?

(Testimony of Burt Lancaster.)

Mr. Williams: This particular publicity that has been testified to was put out by the parent company. Other publicity to which counsel has referred as a personal appearance tour was put out by the distributing company and by the theatres company, depending on which one happened to be interested in the particular place.

The Court: Why don't you confine this to Los Angeles, instead of covering the whole United States, counsel?

Mr. Dryden: All right, sir. [50]

Mr. Williams: Incidentally, I may say the two little parts of newsreel, showing the appearance in New York and some other city, were newsreels of personal appearances of Mr. Lancaster subsequent to the issuance of the first newsreel.

The Court: The personal appearances are not involved in this case, are they?

Mr. Williams: No, your Honor.

Q. (By Mr. Dryden): Now, directing your attention to this particular day out there at the bank, this script was presented to you out there at the time the pictures were being taken; is that correct? A. That's right.

Q. Now, at the time that you were making reference here to the reward of a million dollars, you were not referring to yourself as making such a reward, were you?

A. No, I wasn't. I don't think I said anything about my money, but the money, if that is what you mean.

(Testimony of Burt Lancaster.)

Q. And in so far as you were concerned, at the time that you read that script there, you were referring to Warner Bros. Pictures, Inc.; is that correct?

Mr. Williams: Now, if your Honor please, there is no reference in the portion of the script read by Mr. Lancaster with reference to Warner Bros. Pictures, Inc. As I recall it, that was the part narrated by the narrator, not the [51] part Mr. Lancaster spoke.

Mr. Dryden: I am not concerned with what he spoke. I believe, your Honor, I am entitled to know, in view of the fact there is the contention that no offer was made, as long as he was taken out there by Warner Bros., and this thing was done by Warner Bros. Pictures, to determine from him on whose behalf he felt he was making the offer.

Mr. Williams: We object to that as not being relevant to any issue involved in this case, and immaterial, as to what his thought on the subject was. The question is: What was the language?

The Court: I think we are interested in just what the offer was, counsel.

Mr. Dryden: All right.

Q. (By Mr. Dryden): Now, at the time that you were referring to the offer of the million dollars, you were referring to Warner Bros. Pictures, Inc.; isn't that correct?

Mr. Williams: That is objected to, if your Honor please, on the ground the language of the

(Testimony of Burt Lancaster.)

offer is evidence of what it refers to, and not this witness' understanding.

The Court: I think that is correct, counsel. Let's show Mr. Lancaster this picture?

Do you recognize this picture of publicity? [52]

The Witness: Yes, I do.

The Court: Do you read there where—I think here is one sentence, the first sentence, "Things can't be so bad in the movie business. Warner Bros. offered to give away $1,000,000 today."

Was that your statement?

The Witness: I did not make any statement as is written there.

The Court: This is somebody else's writing; is that it?

The Witness: Yes, I had nothing to do with it.

The Court: You had nothing to do with it?

The Witness: That followed the appearance of the newsreel.

The Court: Oh, this followed?

The Witness: I presume it followed, because I don't know how it could have gotten to the newspapers until after it was shot in the bank.

The Court: I don't think this has been marked. Oh, yes, it has been marked.

Mr. Williams: It was marked for identification, I think.

The Court: Yes. I will return it to the clerk.

Q. (By Mr. Dryden): Who was it that requested that you make the offer that was referred

(Testimony of Burt Lancaster.)

to at the time that you were having the newsreel made? [53]

Mr. Williams: That is objected to as immaterial.

The Court: It isn't very clear, counsel. Wouldn't the evidence show that Mr. Lancaster was taken out there under the direction of the publicity department of Warner Bros., whatever the plaintiff in this case is, their publicity department, and he went out there, and at their instructions, and had the pictures taken?

Mr. Dryden: That is correct, your Honor. I have no further questions.

Mr. Williams: I have no further questions on that.

The Court: That is all, Mr. Lancaster.

Mr. Williams: I understand Mr. Lancaster is to be called later on the other issue?

The Court: I assume so.

Mr. Dryden: Yes, your Honor.

The Court: Call your next witness.

Mr. Dryden: The only other evidence we have with relation to the matter of the offer are the Warner Brothers, who are coming in here at 9:45 tomorrow, your Honor, and I don't want to be presumptuous with this court's time, but we tried to figure out at least some way of accommodating these witnesses and because of these films we felt we couldn't use them until tomorrow morning.

May I inquire as to your Honor's customary closing time?

The Court: Well, it is very close to closing time now [54] and we will take a recess until 10:00 o'clock tomorrow morning. But I want to say to counsel that I am not accustomed to waiting around for witnesses. I expect to have your witnesses present.

I have to wait too much for other people ordinarily without having to wait for witnesses.

Mr. Dryden: May the witnesses who are present be directed to return tomorrow?

The Court: Any witness under subpoena is directed to return tomorrow morning at 10:00 o'clock.

I don't know whether or not you are going to need Mr. Lancaster tomorrow. I suppose he is a busy man but can make himself available if he is needed. I think we should try to accommodate him.

Mr. Dryden: We will certainly try to do that. I anticipate, however, that we will still—we have to hear from the defense first on the question of the offer. I will try to work that out and certainly do my best to accommodate him, your Honor.

The Court: Very well, we will recess until 10:00 o'clock tomorrow morning.

(Whereupon at 4:00 o'clock p.m. a recess was had until 10:00 o'clock a.m., Wednesday, July 22, 1953.) [55]

Wednesday, July 22, 1953, 10:00 a.m.

The Court: You may proceed, gentlemen.

Mr. Dryden: I would like to call Mr. Jack Warner.

Mr. Williams: I just sent for him. He is just coming in.

JACK L. WARNER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, sir?

The Witness: Jack L. Warner.

The Clerk: Thank you. Will you take the stand?

Q. (By Mr. Dryden): Mr. Warner, what is your occupation, sir?

A. I am in charge of production at Warner Bros. studios.

Q. And that is the Warner Bros. Studios, of course, in the Los Angeles office, or the Burbank office, rather, as distinguished from the New York office? A. Burbank, yes, sir.

Q. What are your general duties with relation to the operation of the Warner Bros. Studios here?

A. The general duties are seeing that pictures are made [57] and shipped East.

Q. In that respect, do you recall entering into a contract with Norma Productions relating to the production of the picture The Flame and The Arrow? A. Yes, I do.

Q. Your counsel has handed me a photostatic copy of what purports to be that contract. Do you recognize that as being the contract?

A. If my counsel says so. Yes, it is, undoubtedly, if he says so.

(Testimony of Jack L. Warner.)

Mr. Williams: Mr. Warner, will you speak a little louder, please?

The Witness: I said if my counsel says so, undoubtedly it is.

Mr. Dryden: I will ask it be marked for identification.

Mr. Williams: We object to it. I can't object to the marking for identification, of course, but I told counsel this was one from another case, and I will have to arrange to get another copy some way or other to substitute here.

Mr. Dryden: I have no objection to that. I just want it marked for identification.

The Court: You will have no difficulty getting copies. That is no obstacle.

The Clerk: 7, for identification. [58]

(The document referred to was marked Plaintiff's Exhibit 7, for identification.)

[See page 314.]

Q. (By Mr. Dryden): Now, did you participate in the arrangements for the making of the picture The Flame and The Arrow? A. Yes, I did.

Q. With relation to the question of advertising and publicity, in so far as that picture was concerned, that was assigned to Mr. Evelove; is that correct?

A. I would say it was assigned to the complete publicity department at the studio, so far as the production is concerned, the making of the publicity while the picture was being made.

Q. And after the picture was concluded, that

(Testimony of Jack L. Warner.)

was likewise offered to the publicity department, was it?

A. When the pictures are completed, the publicity is assigned to the New York publicity department.

Q. All right. Now, in this particular case you were familiar with the instructions from New York relative to publicizing the stunts of Burt Lancaster, were you not?

A. No, I was not familiar at all.

Q. Did you see the newsreel with relation to this million-dollar offer?

A. I did see the newsreel, yes, sir.

Q. And when and where did you see the newsreel? [59]

A. I saw it in our studios; just when, I don't know, but I saw this particular newsreel that had this offer in it, whatever it was.

Q. As I understand, from what you have told me here—I withdraw that for the moment. Do you recall in the newsreel that you saw——

Mr. Dryden: Perhaps I had better get that exhibit, if I may.

Mr. Swartz: That is 6.

Mr. Dryden: I am looking here at Plaintiff's Exhibit 6.

The Court: May I ask counsel: Is this newsreel publicity we were talking about before or after the picture was released?

Mr. Dryden: This newsreel was released just

(Testimony of Jack L. Warner.)

about the same time that the picture was released, your Honor, is my understanding.

Mr. Williams: I think that the newsreel and the picture were released during the same week, your Honor. As to whether one came in a day or two before the other, I can't say.

Th Court: That is true also of the newspaper publicity.

Mr. Williams: Some of the newspaper publicity that has been identified here was before the picture was released and some of it about the time the picture was released.

Q. (By Mr. Dryden): Now, directing your attention here to this Exhibit 6, which purports to be the actual newsreel script, at the time that you heard this newsreel do you recall [60] the statement in there as follows:

"In Hollywood Burt Lancaster counts the $1,000,000 reward offered by Warner Bros. to anyone who can prove that Burt himself didn't perform all his daring stunts in The Flame and The Arrow"?

A. It has been so long ago I can't say just what it was, but it was words to that effect, no doubt.

Q. Now, what is your capacity with Warner News, Inc.?

A. Nothing whatsoever. I have nothing to do with the newsreels.

(Testimony of Jack L. Warner.)

Q. I understand from our—withdraw that for the moment. Warner Bros. bought the RKO-Pathe News in August of 1947, isn't that correct?

The Court: I understand, counsel, that was stipulated to.

Mr. Williams: We stipulated to that.

The Court: It was stipulated it is a subsidiary of Warner Bros.

Mr. Dryden: I was going to make reference to the shield that is shown on the newsreel, your Honor.

The Court: What?

Mr. Dryden: I was going to inquire with relation to Warner Bros.'s shield as shown in the newsreel.

The Court: What would that prove? Why isn't the stipulation broad enough to cover that? [61]

Mr. Dryden: If your Honor feels it is I will not ask any further questions.

The Court: I think it is, but I don't want to preclude counsel from presenting his case. It seems to me, however, when you have a stipulation that is better than anything you can attempt to prove.

Mr. Dryden: All right.

Q. (By Mr. Dryden): Mr. Warner, in your capacity, being in charge of the Burbank Studios, Norma Productions never authorized Warner Bros.

(Testimony of Jack L. Warner.)

to make an offer of $1,000,000 reward on their behalf, was there?

A. I must enlighten you on the whole incident if I can.

Q. Will you just answer the question?

A. Well, the question is hard to answer.

Q. It is simply this. Did anybody connected with Norma Productions authorize you to offer a $1,000,000 reward of their money?

A. I was never in contact or had anything to do with this complete offer, newsreel or any other or any part of the stunt or whatever it may be called.

Q. Well, in your capacity as an officer of your company, were you ever informed at any time that Norma Productions had authorized Warner Bros. to offer a $1,000,000 reward of their money as related to this picture? [62] A. No.

Q. Now, after you saw——

The Court: Do you wish to make any explanation with reference to your answer. You may have that privilege.

The Witness: The only explanation I wanted to make was——

The Court: You want to remember sometimes people talk too much.

The Witness: That causes a lot of trouble but I personally, in my capacity, have nothing whatever to do with the newsreels, the publicity, or how all this came about or in fact anything comes about in the publicity department in our studio. We have

(Testimony of Jack L. Warner.)

a department that does that. They do it on their own accord.

The Court: That is delegated authority?

The Witness: Yes, that is right, sir. It is impossible for me to do everything and that is one of the things I just haven't time to do or can't do. I am not qualified for it.

Q. (By Mr. Dryden): In other words you feel you have competent people and you delegate to them that work and let them handle it as they see fit, is that correct?

A. Yes, that is correct.

The Court: But if they don't do it as you see fit then you fire them?

The Witness: Or they may fire me. [63]

Q. (By Mr. Dryden): Did you ever ascertain who it was that was the announcer in the newsreel that made reference to the reward?

A. I knew nothing about the complete incident. We call it a "clip" in a newsreel. I saw it on the screen but never knew it was being made and never knew anything about it. I looked at it just the same as you do any other newsreel, which I do for my own enlightenment each week.

Q. When you saw the newsreel that made reference to the reward offered by Warner Bros. in the language that I referred to, did you do anything with relation to ordering that continuity changed?

A. No, I did not.

Q. Did you do anything with relation to repudiating that offer that was made in the newsreel?

(Testimony of Jack L. Warner.)

A. No, I did nothing whatsoever. Just as I said before, I looked at it for—I look at all newsreels. It keeps you alert to what is going on in the world and I passed it off as though it was just a part of the newsreel.

Q. Is Mr. Evelove in charge of the publicity department or does he have a superior?

A. At the studio—no, I can't remember if—I don't think he had a superior at this time to my knowledge. I just don't know.

Q. Do you know Mr. Alan Pomroy? [64]

A. I only know him by seeing him on the screen. I don't believe I have met him. I may have over the years but I can't remember.

Q. Do you know of your own knowledge approximately to date what this picture has grossed?

A. I don't know.

The Court: What materiality is that, counsel?

Mr. Dryden: It goes to the question of the benefits received by reason of this advertising, your Honor. If you think that is a matter that you can take judicial notice of I certainly shall not inquire further.

Mr. Williams: I object to that.

The Court: They are not running an organization for their health.

Mr. Dryden: No, not by any means.

Q. (By Mr. Dryden): Now, without going into too much detail, as I understand it there is Warner Bros. Pictures, Inc. here that you have locally, is that correct?

(Testimony of Jack L. Warner.)

A. Warner Bros. Pictures, Inc. is the parent corporation.

Q. Then you have the Warner Bros. Distributors—what other companies do you have other than Warner Bros. Pictures, Inc. here locally?

The Court: That was all stipulated to yesterday, counsel.

Mr. Dryden: I understood there was some 31 companies [65] with that name in various capacities but I didn't know that it was in the record.

Mr. Williams: I am certain this witness can't tell him if there are 31 of them from memory. We have made a stipulation as to those that are involved in this case.

The Court: I am familiar with the stipulation, counsel.

Mr. Dryden: All right.

Q. (By Mr. Dryden): As I understand from the testimony yesterday you have a publicity department here that is under the supervision of the New York office? A. Yes, they are, sir.

The Court: And the publicity is supervised by them before it is released as far as the newsreels are concerned?

The Witness: They kind of supervise each other. It is such a fast moving business.

The Court: The testimony here yesterday was to the effect that the newsreel was made and then the script was prepared and sent to New York and then the newsreel was prepared in New York and

(Testimony of Jack L. Warner.)

then returned here where it is released. Is that the way it works?

The Witness: Yes, in this particular clip.

The Court: How about the ordinary publicity that is in the newspapers, do your local people put that out without consulting New York?

The Witness: Yes, we do. They run almost on their [66] own economy. It is sort of a hit and miss publicity idea.

The Court: They have a regular mill for it?

The Witness: Yes, and the newspaper people seem to demand those releases from us every day. They telephone us every day and ask for publicity with reference to the people we sign up as an actor or when we start a new story. It is a regular mill. I think that would cover it good.

Q. (By Mr. Dryden): Was any offer of reward, as it related to the picture The Flame and The Arrow ever repudiated by Warner Bros. Studio?

Mr. Williams: That is objected to, your Honor please, on the ground it assumes a fact not in evidence, namely, that an offer of reward was made.

Mr. Swartz: May I be heard on that, your Honor?

Mr. Williams: And it also calls for a conclusion and speculation on the part of the witness.

The Court: I think it calls for a conclusion. I think the answer to the question is when he said he didn't do anything about it, and he saw the newsreel. Isn't that your answer?

Q. (By Mr. Dryden): Then, I take it nothing

(Testimony of Jack L. Warner.)

was done, either verbally or in writing, with relation to this; is that correct?

A. So far as I was concerned, no. I don't know what else was done, but I personally didn't do anything. [67]

Q. Do you have any knowledge of anything having been done by your studio?

A. No, I do not have.

The Court: Gentlemen, I don't know that I am too familiar with the requests for admissions. This letter of acceptance of a so-called offer, is there any question about its having been written, and what happened to it?

Mr. Dryden: No, I don't believe there is any question at all, your Honor. We have the letter.

The Court: I just thought that the requests for admissions must have included that.

Mr. Williams: I don't remember that that was included in the requests for admission, your Honor, but we have a letter dated October 20, 1950, addressed to Warner Bros. Pictures, Inc. and Warner Bros. Studios, and signed by M. L. Marcus.

Mr. Dryden: He is one of the associate counsel in this matter, and was the original attorney.

Mr. Williams: It shows that it was received on October 21st by the Studio, and that is the only knowledge we have of any so-called acceptance.

The Court: I understood from the pleadings some place along the line that the plaintiff in this case had written a letter accepting the offer.

Mr. Williams: We have never seen such a letter.

(Testimony of Jack L. Warner.)

Mr. Dryden: That is true. It was written through his attorney, Mr. Morris Marcus.

Mr. Williams: Is that the letter which I have just described?

Mr. Dryden: We can take a look at the copy and see. I believe it is. In view of that statement, may I offer this in evidence?

Mr. Williams: Yes, but you haven't answered my question as to whether that is the letter to which you refer,——

Mr. Dryden: Yes.

Mr. Williams: ——as being the acceptance of the so-called offer.

Mr. Swartz: The letter, of course, speaks for itself. It refers to a prior acceptance, and it is the record notice about it.

Mr. Williams: The letter is no proof of the contents itself.

Mr. Swartz: We will have it admitted, and put on evidence with respect to that. I don't think it should be the subject of a stipulation.

Mr. Dryden: What happened, as I understand it, your Honor, is the fact that they were put on notice that this was accepted, and then it was confirmed in writing.

Mr. Swartz: That is right.

The Court: You have been very quiet about that feature [69] of the case up to this time, and I wondered if it was covered by admissions not in evidence, that I haven't as yet seen, or by the answer.

(Testimony of Jack L. Warner.)

I didn't know whether it was an issue in the case or not.

Mr. Williams: It certainly is an issue, your Honor; no doubt about that.

Mr. Dryden: In any event, I will offer this now.

The Court: There is nothing to indicate that it isn't in issue, so far as you are concerned?

Mr. Williams: No, your Honor. That would be Exhibit No. what?

The Clerk: Exhibit 8. Is this going in evidence?

Mr. Dryden: Yes.

The Clerk: In evidence.

(The document, marked Plaintiff's Exhibit 8, for identification, was received in evidence.)

[See page 386.]

Q. (By Mr. Dryden): This may be repetitious, your Honor, but it was called to my attention. You are a director of Warner Bros.; isn't that right?

A. Yes, I am.

Q. Did the directors ever do anything with relation to changing or altering the continuity of the newsreel that you listened to? A. No.

Q. In so far as you know? [70]

A. No, I don't believe that would be their function.

Q. Aside from that, in so far as you know did they ever issue any repudiation, pursuant to the instructions of the board of directors with relation to this purported offer?

A. I don't know. I don't think so.

(Testimony of Jack L. Warner.)

Mr. Dryden: I don't believe I have any further questions, your Honor.

Cross Examination

Q. (By Mr. Williams): Did the board of directors, to your knowledge, ever authorize any person to give away or offer as a reward, or otherwise, to any person the sum of $1,000,000?

Mr. Dryden: That is objected to upon the following grounds: It is compound, it is leading, and suggestive, calls for an opinion and conclusion in so far as this witness is concerned, and is an invasion of the ultimate fact to be decided by the trier of fact.

The Court: Counsel, then, the only thing is that the minutes of the directors' meetings would be the best evidence, wouldn't it?

Mr. Dryden: Yes.

Mr. Williams: Well, the fact is that counsel asked the question.

The Court: Counsel asked the question, and you kept quiet, too. [71]

Mr. Williams: There was a reason.

The Court: Well, maybe so.

Mr. Williams: Of course, the only thing that can be shown on this is by producing all the minutes, having all the minutes of all the meetings for the purpose of showing that.

The Court: All the witness could say is that there was no direction at any meeting he ever attended, but that does not mean there wasn't any,

(Testimony of Jack L. Warner.)

because there is no evidence he did attend all of them. Undoubtedly they hold meetings in New York all along without his attendence.

Mr. Williams: That is right. Undoubtedly, he received notice of the meetings and the minutes of the meetings.

The Court: That is right.

Q. (By Mr. Williams): That is correct, isn't it, Mr. Warner?

A. I do. Not to my knowledge, there has never been anything like this brought up to the board of directors.

Mr. Dryden: Just a minute. I move to strike that. It is not a response to the pending questions.

The Court: Counsel, if that is a fact,—well, you don't contend that they did it at any time, do you? Did you ever bring this matter up before the board of directors?

Mr. Dryden: I have no knowledge to indicate that they did, your Honor, and so I cannot certainly so represent to the court. By the same token, I have no knowledge that they [72] didn't. I would assume under normal circumstances, in view of what he has said, that matters of this kind with relation to the making of rewards, and so forth, was left to the delegated persons rather than taken up before the board of directors.

The Court: Then what does his testimony amount to? It amounts to a negative, so far as that question is concerned, doesn't it, all the way around?

Mr. Dryden: That is correct.

(Testimony of Jack L. Warner.)

The Court: Both from your questions and on the questions by Mr. Williams.

Mr. Williams: That is correct.

The Court: He has answered the question.

Mr. Williams: He has answered it. I have no further questions.

The Court: That is all.

Mr. Williams: May this witness now be excused, your Honor?

The Court: As far as the court is concerned.

Mr. Dryden: Yes, I don't anticipate we will need him any further. I assume we can have the same stipulation in so far as this witness is concerned. As I understand, the other witness will leave town.

Mr. Williams: Yes. So far as Mr. J. L. Warner is concerned, if you need him, I think we can have him back [73] on about an hour's notice.

Mr. Dryden: Yes. I will call Mr. Harry Warner.

HARRY M. WARNER

called a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you please state your name?

The Witness: Harry M. Warner.

The Clerk: Thank you. Will you take the stand.

Q. (By Mr. Dryden): Mr. Warner, what is your relationship with Warner Bros.?

A. I am the president of Warner Bros. Pictures, Inc.

(Testimony of Harry M. Warner.)

Q. Do you maintain your principal offices in your capacity here or in New York?

A. For quite some years I have retained it here.

Q. Do you have any personal knowledge yourself with relation to this picture, The Flame and The Arrow? A. No, sir.

Q. Do you have any personal knowledge——

A. With one exception, that I once asked our counsel, Herbert Freston, "What's it all about?" when I read about it in the paper. [74]

Q. Well, I am not going to ask you what he said.

A. I am not telling you, sir.

Q. Mr. Warner, do you have any knowledge of the publicity that went out with relation to this picture at all? A. No, sir.

Q. As I gather from you, then, the only thing you know about this entire situation relates to what you read in the papers subsequent to the indications of litigation; is that right?

A. That's right, sir.

Q. What is your relationship with the Newsreel Company,—that is Warner News, Inc., isn't it?

A. My relationship is to have the proper people operate it.

Q. Are you in a capacity such that you determine who is to operate that company?

A. That company, or any other company, sir.

Q. And who is the operator of that particular company?

A. Norman Moray is the man who operates our

(Testimony of Harry M. Warner.)

shorts department, and he has charge of the operating of the newsreels.

Q. And you are the one that appointed him to that particular position; is that right?

A. Yes, sir.

Q. Did you appoint the other executives to that particular [75] organization?

A. No. I appoint the top executives of every organization throughout the United States.

Q. Then, in so far as the men in charge of the various owned subsidiaries, you appoint the top executives of each one of them, including Warner News, Inc.; is that correct? A. Yes, sir.

The Court: And then they run it themselves?

The Witness: They run it. I would be quite a man if I would try to run everything else.

Q. (By Mr. Dryden): Subsequent to your ascertaining the fact that there was some claim made relative to this offer, was there ever any disciplinary action taken with relation to any of the personnel either of Warner Bros. or Warner News, Inc.? A. No, sir.

Mr. Dryden: I have no further questions, your Honor.

The Court: Any questions, counsel?

Cross Examination

Q. (By Mr. Williams): You are a member of the Board of Directors of Warner Bros.?

A. Yes, sir. [76]

Q. So far as you know, was the matter of au-

(Testimony of Harry M. Warner.)

thorizing any person to make any offer or gift on behalf of Warner Bros. ever taken up before the board of directors? A. No, sir.

Mr. Williams: That is all.

The Witness: Of course—pardon me—I am not at every meeting.

The Court: He said, "So far as you know."

The Witness: No, sir.

The Court: That is all.

(Witness excused.)

Mr. Dryden: Will you take the stand, Mr. Garrison?

JULES GARRISON

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Jules Garrison.

Direct Examination

Q. (By Mr. Dryden): Mr. Garrison, directing your attention to the month of July 1950, did you have occasion to see a newsreel relating to the picture The Flame and The Arrow?

A. Yes, I did. [76]

Q. And in seeing that newsreel do you have any recollection of what was said with relation to any reward? A. Yes.

The Court: Counsel, what is the purpose of going into the wording of it. It has already been stipulated to.

Mr. Dryden: All right, your Honor.

(Testimony of Jules Garrison.)

Q. (By Mr. Dryden): Now, after hearing the script of the newsreel did you then go and see the picture The Flame and The Arrow?

A. Yes, I did.

Q. And when was it that you saw the Flame and The Arrow for the first time with reference to your observations of the newsreel?

A. I am not positive but I am pretty sure it was the same day—that is the same day or the next day. I think I went the same day.

Q. And did you have occasion to go and see this picture more than once?

A. On many occasions.

Q. Prior to the time that you went to these movies had you had occasion to work in the industry in the capacity as a stand-in or extra?

A. Yes, I did.

Q. And did you know Don Turner, a stunt man?

A. I have seen him around the studios. [77]

Q. All right. Now, when you saw the picture The Flame and The Arrow, particularly as it related to the character Dardo, did you see any sequences in there wherein you observed—wherein you observed Don Turner playing the part of the character Dardo?

A. Not right away, not until after other things had happened.

Q. Well now, I will get into the other things a little later, but what I want to know is this. When you saw this picture did you observe Don Turner

(Testimony of Jules Garrison.)

playing the part of Dardo? A. Yes.

Q. In some of the sequences? A. Yes.

Q. All right. Now what sequences in the picture did you observe Don Turner playing in?

A. The riding sequence at the head of a band of horses in the courtyard where the big fight takes place and in the rescue of Papa Pietro and in the roof stunt—going upon the roof.

Q. That was with the midge?

A. That was where the midget was carried on his shoulders up over the roofs and there were other places. I wasn't sure of them at the time.

Q. What about the fight sequence with relation to [78] the duel between Allesandro and Dardo?

A. I was pretty sure of it but it was a little dark.

Q. Now, subsequent to making these observations did you do anything with relation to communicating with the studio? Answer that question yes or no.

A. Yes.

Q. All right. And was that by telephone or in what manner?

A. Through Mr. Marcus, the attorney.

Q. Was the first connection with Warner Bros. by letter or telephone—was it a conversation insofar as you know?

A. I telephoned them first.

Q. All right. You telephoned them first?

A. Yes.

Q. When you telephoned them what did you say?

(Testimony of Jules Garrison.)

Mr. Williams: That is objected to as no proper foundation having been laid as to who he talked with.

Q. (By Mr. Dryden): When you talked to the studio did they identify themselves, the person you talked to?

A. No. They turned me over to—they couldn't seem to find out who to turn me over to. They turned me over to Freston & Files and said to give it to them.

Q. Did you then call Freston & Files?

A. Yes, I did. [79]

Q. And did you talk to anyone there insofar as you can identify them?

A. I believe I talked to Mr. Files.

Q. And was anything said——

The Court: Which Mr. Files? Do you know which Mr. Files?

The Witness: No, I don't.

Mr. Williams: We are willing to stipulate it was Mr. Gordon Files.

Q. (By Mr. Dryden): Was anything said about —I will accept the stipulation. Was anything said at that time with relation to accepting the offer that you had seen in the newsreel?

A. Yes, I accepted the offer.

Mr. Williams: Just a moment.

The Court: What did you say?

Mr. Williams: I move to strike that out as being a conclusion and the witness be instructed to say what he said.

(Testimony of Jules Garrison.)

The Court: Yes, that is correct.

Q. (By Mr. Dryden): What did you say?

A. I said that I had seen the motion picture called The Flame and The Arrow or, rather, I had seen the offer in the newsreel wherein Burt Lancaster had, in behalf of Warner Bros., offered $1,000,000 to anyone who could prove that "I do not do all of the stunts in the picture," and I said that I felt sure I could prove it and told them that I had [80] tried to get the award accepted publicly in some way but didn't do it so I was calling them up to let them know and they didn't want to give me the $1,000,000 and I told them I would go and get a lawyer and try to get it for myself. That was about the substance of it.

Q. Did you then consult——

The Court: They didn't hand you out the $1,000,000?

The Witness: No.

Q. (By Mr. Dryden): Did you go and consult with an attorney at that time? A. Yes.

Q. And what was his name?

A. Well, I first consulted with some attorneys in Hollywood. I was referred to them by one of the trade papers.

Q. Well, particularly Mr. Marcus, did you go see Mr. Marcus?

A. Yes, I saw Mr. Marcus. I talked to him about it.

Q. And in connection with that did you author-

(Testimony of Jules Garrison.)

ize Mr. Marcus to write a letter to Warner Bros. Studio relating to this meeting?

A. Yes, I did.

Mr. Dryden: I have no further questions at this time, your Honor. [81]

Cross Examination

Q. (By Mr. Williams): Mr. Garrison, you worked on this picture, The Flame and The Arrow, did you not? A. Yes, I did.

Q. And you worked as an extra?

A. As an extra, yes.

Q. How many days did you work on the picture?

A. I worked approximately a week.

Q. Approximately a week, you say?

A. Yes. I am not positive of that. That is just a good guess.

Q. What did you do?

A. I was what is known as an atmosphere player, mingling in the crowd and wearing a costume and sometimes a wig and doing about everything they tell you to do.

Q. And in what sequence did you work?

A. I worked in the—I worked in the scene—well, I can't remember them exactly, but I worked in—I was a soldier—that is an extra soldier in one scene. There were a lot of other soldiers in the great hall. I was in some of the scenes in the great hall. I was in some of the scenes at the supposed execution of Dardo. I don't remember any others.

(Testimony of Jules Garrison.)

Q. Would you say, if I stated to you that our records [82] show that you worked 12 days on that picture as an extra, that that was probably correct? A. Yes, sir.

Q. And it shows that you worked as an extra in the scene in the great hall where the fight was taking place and also in the——

A. No, there was no fight taking place.

Q. But you worked in the scenes in the great hall? A. In the great hall, yes.

Q. You weren't there when the fight took place? A. What fight, sir?

Q. Any fight.

A. There was what you call a general melee. There were 300 or 400 extras when they rushed the castle. There was one big crowd that batted the door down from the outside and then there was a crowd inside and I don't know what you would call it. I guess you would call it a fight, yes.

Q. Now, you were working as an extra during that scene? A. Yes, sir.

Q. And what other place besides in the great hall was it that you worker as an extra?

A. Well, I was supposed to work in two or three others.

The Court: I don't care what you were supposed to work at. Where did you work. That is the question. [83]

The Witness: What I meant, your Honor, was I was listed as a rider for two or three days, I believe, but I don't ride so I stayed out of the way.

(Testimony of Jules Garrison.)

Q. (By Mr. Williams): That didn't interfere with your getting your check for that day, did it?

A. Well, we do other things in the day's work besides riding.

Q. Now, you first called the Warner Bros. Studio by dialing the telephone number of that studio, did you? A. Yes, sir.

Q. And a girl answered the telephone, a telephone operator, apparently? A. Yes, sir.

Q. And you told her that you wanted to contact somebody about collecting $1,000,000 reward in connection with The Flame and The Arrow?

A. Yes, sir.

Q. And after some hesitation on her part she referred you to the law firm of Freston & Files?

A. No, I wouldn't say she did. I can't name any names but I talked to—I talked to somebody at the studio. I don't know who it was. I talked to someone there besides the telephone operator. Probably someone in the production office.

Mr. Williams: Just a minute. I move to strike out [84] "probably."

The Court: That is true.

The Witness: I talked to someone.

Q. (By Mr. Williams): You don't know who you talked to?

A. I would say the operator referred me to the —I believe she referred me to the production office and they advised me to call Freston & Files.

Q. Then you called and talked to a man who

(Testimony of Jules Garrison.)

told you his name was Gordon Files, is that correct? A. Yes, sir.

Q. Would you give us the date of that conversation?

A. I can't give it to you exactly but it was about two or three weeks before I spoke to Mr. Marcus, the attorney.

Q. If I told you that our records show the date was October 9, 1950 would you agree that that is about the date that you talked—that you did talk to Mr. Files?

A. I couldn't be sure, sir.

Q. You wouldn't say it was not October 9, 1950, would you? A. No, I wouldn't.

Q. Now, you had a conversation with him and how long was that conversation?

A. Quite a long one as I remember it.

Q. And what you told him was that you had read the [85] advertising matter or had seen the advertising matter in connection with an offer of $1,000,000? A. Yes, sir.

Q. Had you seen anything except the newsreel at that time?

A. Yes. I had seen—I believe I had seen the newspaper article in the Mirror.

Mr. Williams: May I have that exhibit for identification, please?

Q. (By Mr. Williams): When you say you had seen the newspaper article in the Mirror, are you referring to the article that your counsel produced

(Testimony of Jules Garrison.)

here that has been marked for identification as Exhibit 3? A. Yes, sir.

Q. That is the one you referred to?

A. Yes.

Q. Did you see any other written matter except this article which appeared in the Mirror?

A. Not that I can remember now.

Q. Had you seen that article that appeared in the Mirror before you called up the studio?

A. I am not sure whether it was before or afterwards.

Q. Now tell me the exact language you used when you spoke to Mr. Files about this offer?

A. That would be difficult, sir. [86]

Q. Give me your best recollection. I know you can't give us the exact language, but give us your best recollection, Mr. Garrison.

A. I told him, as I said, that I had seen the offer and that I felt sure I could prove that Mr. Lancaster did not do all his own stunts and that I would like the $1,000,000.

Q. Was that the extent of the conversation?

A. No, that wasn't all of it.

Q. Tell us the rest of it.

A. Mr. Files said that they didn't know anything about it and I went on to explain to him about it, what it was and where I had seen it.

Q. What did you say?

A. I said that it was in the form of a newsreel at the Newsreel Theatre. It was part of the regular world news and that I deemed it to be an authentic

(Testimony of Jules Garrison.)

offer and that I had seen the picture, I think by that time, more than once. And I explained to him some of the scenes that I thought that Mr. Lancaster didn't do his own stunts—that they were fantastic and so on. And he took all that information down and I told him that I felt——

The Court: How do you know he took it down if you talked to him over the telephone?

The Witness: I just took it for granted, your Honor. And then I told him that I didn't think that I was going to [87] be the only one that would accept this offer; that perhaps other people would see it and it would play all over the world and I said I would wait two or three weeks and if I didn't hear from them I would get a lawyer.

Q. (By Mr. Williams): Was there anything else that was said?

A. That is all I remember now, sir.

Q. Did you tell him what proof you would get —you thought you could get?

A. I don't think I talked very much about that. I tried——

Q. Did you mention Don Turner's name to him?

A. I am not sure whether I did or not.

Q. Would you say you did or did not, according to your best recollection?

A. By that time I don't know whether I had my pictures or not, the still pictures that I have now.

Mr. Williams: Will you read that answer?

(Answer read.)

Q. (By Mr. Williams): The question I asked

(Testimony of Jules Garrison.)

you, Mr. Garrison, was did you say anything to Mr. Files about Mr. Turner? What is your best recollection?

A. I may have, yes. I probably did.

Q. Did you say anything to him about Billie Curtis, the midget? [88]

A. I may have, yes.

Q. Do you remember what if anything you said to him about Billie Curtis?

A. I probably told him that I——

The Court: Not what you probably told him.

The Witness: I am sorry. I didn't mean to use that term, your Honor. I told him that I had talked to Billie Curtis and that Billie Curtis had admitted being carried up on the roof by Don Turner.

Q. (By Mr. Williams): Did you talk to him about Alan Pomroy?

A. No, sir. I don't remember talking to him about Alan Pomroy.

Q. Didn't you say to him that Alan Pomroy admitted to you that Don Turner did the stunt of climbing up on the roof?

A. I may have—I am not sure.

Q. Well, what is your best recollection?

A. Many people admitted that same thing.

Q. I am asking you about a conversation with Mr. Files as to what you told him.

A. I may have, yes, sir.

Q. Well then, your best recollection is that you did tell him that Alan Pomroy had admitted to

(Testimony of Jules Garrison.)

you that Don Turner did the stunt of climbing up on the roof? [89]

A. I may have—I am not sure.

Q. Well, what is your best recollection?

A. Many people admitted that same thing.

Q. I am asking you about a conversation with Mr. Files as to what you told him.

A. I may have, yes, sir.

Q. Well then, your best recollection is that you did tell him that Alan Pomroy had admitted to you that Don Turner did the stunt of climbing up on the roof?

A. I can't be sure whether I said that or not, sir.

Q. Did you also tell him that you had a tape recording of the conversation you had with Alan Pomroy?

A. I don't remember telling him that, sir.

Q. Well, would you say you did or did not tell him that? A. I would say I did not.

Q. You are definite on that subject, are you?

A. At this late date I am not definite about anything, sir.

Q. Well, did you in fact have a tape recording of a telephone conversation with Alan Pomroy?

A. No, sir.

Q. So if you did tell him that it was not the truth?

Mr. Dryden: That is objected to on the ground it is argumentative, your Honor. [90]

The Court: It is argumentative.

(Testimony of Jules Garrison.)

Mr. Williams: I think so. I think the argument has already been made.

Mr. Dryden: I don't follow Mr. Williams but I make my objection for the record, your Honor.

Q. (By Mr. Williams): Did you tell him that you had a part of the wardrobe that had been used in the picture which you were prepared to produce as evidence?

A. Sir, I would like to answer that another way.

Q. Answer me whether you told him that.

A. Yes.

Q. And did you in fact have a part of the wardrobe? A. No, sir.

Q. Did you tell him that you would be willing to forget that you could prove these things if Warner Bros. would give you some money?

A. I worded it much differently, sir.

Q. How did you word it?

A. I said I would take less than $1,000,000.

Q. Did you say what amount you would take?

A. Not exactly, no.

Q. Did you say to him that you wanted to go to New York for the current theatrical season and try to work there and in order to accomplish that you needed a suit of clothes and transportation and some spending money? [91]

A. I don't remember that, sir. I might have.

Q. You say you may have said that?

The Court: Do you remember whether you said any such thing?

The Witness: Yes, I would say I said it.

(Testimony of Jules Garrison.)

Q. (By Mr. Williams): Yes. And you said that under those circumstances that you thought that the attorneys for Warner Bros. would understand your position and possibly something could be done for you without the necessity of your taking any action which would publicize the claim, is that correct?

A. For their benefit as much as mine, sir.

Q. Did you mention any particular sum?

A. No, I don't think I did, sir.

Q. But you did say that if they would pay a sum which was satisfactory to you, that you would not bring an action and that you would not publicize the matter, is that correct?

A. I don't remember saying anything—no, there is a misunderstanding about that, sir, about the publicizing. I said that I didn't want the publicity any more than they did—that kind of publicity.

Q. And you would settle—and if they would settle for an amount satisfactory to you you wouldn't cause any publicity, is that it?

A. No, sir. I said that I did not want the publicity [92] any more than they did because that is not the type of publicity that they want and it most certainly isn't the kind that I want.

Q. Did Mr. Files say—did you tell Mr. Files that you had employed an attorney in the matter?

A. I said that I was going to. I said——

Q. Did you tell him that you had employed an attorney named Mr. Levoy?

A. I don't remember, sir.

(Testimony of Jules Garrison.)

Q. Didn't Mr. Files say to you that if you were represented by an attorney that he could not discuss the matter with you at all?

A. Yes. At that time I had spoken to one or two attorneys but I hadn't any contract with them.

Q. Didn't you say to him that you didn't want to split this up with any attorney and you would dispose of the attorney and he said: "Well, I can't talk with you as long as you have an attorney."

The Witness: Your Honor, that is a telephone conversation of three years ago. I am not sure of those things.

Q. (By Mr. Williams): I am asking you for your best recollection.

A. I don't know, Mr. Williams. It sounds to me like perhaps Mr. Files took a tape recording of my conversation if he remembers it that well.

Q. Well, let us not discuss that. I move to strike that, if your Honor please, as not responsive to the question.

The Court: What difference does it make?

Mr. Williams: It doesn't make any difference.

Q. (By Mr. Williams): But did you tell him or did he tell you, rather, that he would decline to discuss the matter with you as long as you were represented by an attorney? A. Yes.

Q. And did you then tell him that you didn't want an attorney anyway and that you were going to discharge your attorney?

A. I didn't have an attorney, sir.

(Testimony of Jules Garrison.)

Q. I know, but I am asking you what you told him.

The Court: Did you say that?

The Witness: (No answer.)

Q. (By Mr. Williams): You told him you were going to discharge your attorney?

A. I told him I had—if I told him I had one I would have told him I was going to try to——

Q. Well, do you remember what you did tell him? A. No, sir, I don't.

Q. Isn't it a fact then that you did thereafter, on about the 12th of October to be exact, about three days after the first conversation, call Mr. Gordon Files again and tell him that you no longer had an attorney and you wanted to talk [94] the matter over with him?

A. I do not remember, sir. I don't remember calling him twice.

Q. Would you say you did not call him the second time?

A. No, sir, I wouldn't say that I did not.

Q. And isn't it a fact that in your second conversation Mr. Gordon Files told you that he had in the meantime looked into the matter and he told you that Warner Bros. had made no offer of $1,000,000. Isn't that correct?

A. No, sir, it is not correct.

Q. Isn't it a fact that he told you if any such offer had been made or thought any such offer had been made he wanted you to know it was withdrawn? A. No, sir.

(Testimony of Jules Garrison.)

Q. Did he also tell you it was a fact that Burt Lancaster had done all of his daring stunts in the picture The Flame and The Arrow?

A. No, sir.

Q. Did any part of that conversation take place between you and Mr. Gordon Files?

A. No, sir.

Q. And you are not clear as to whether you did in fact have a second conversation with him?

A. The only time I talked to him, Mr. Williams, I left it up in the air. I said if I did not hear from him [95] and I left my telephone number——

The Court: He is asking you a question. What is your best recollection? Did you just have one conversation with him or did you have two?

The Witness: I am not sure, your Honor, I am not sure.

The Court: Is that your best recollection?

The Witness: I may have had three, your Honor. Yes, your Honor, I probably had more than one conversation with them.

Q. (By Mr. Williams): Isn't it a fact that on the second conversation, after Mr. Files had told you that Warner Bros. had made no offer, and that he understood that if there was an offer he wanted you to know it was withdrawn, and, in addition to that, Lancaster had done his own stunts, didn't you then tell him that you wanted him to think it over and that you would give him a week, and if you hadn't heard from him in a week, you would employ an attorney?

(Testimony of Jules Garrison.)

A. No, sir, it doesn't seem to me that was the way we worded it.

Q. How did you word it?

A. He said, he denied any knowledge of what I was talking about. He said they would look into it, and I said I would like to hear from them in two weeks.

Q. It is a fact, is it not, that in the first conversation Mr. Files told you he had no knowledge of the matter [96] at all, and he would have to look into it; is that correct?

A. That's correct.

Q. And isn't it a fact that in the second conversation he told you that he had looked into it, and that Warner Bros. had made no such offer?

A. I don't remember.

Q. And it was after that you told him you would give him this week to do something about it?

A. No, sir, I do not remember any such conversation.

Mr. Williams: I have no further questions.

Redirect Examination

Q. (By Mr. Dryden): Mr. Garrison, did you, in your capacity as an extra out there work on any of the pictures in the capacity of an extra at the time that the sequence was made with Dardo carrying the boy across the roof?

A. At the very beginning of it, yes.

Q. What part are you referring to?

(Testimony of Jules Garrison.)

A. Well, just as we were going home one day, they rigged up——

Q. I am talking about the picture.

A. The picture, yes. They did the scene where the six stunt men fall—the six stunt men fall; that is, as Burt Lancaster or Don Turner, or whoever it was, ran up the [97] ladder and to the side of the roof. The first part of that scene was photographed, but we had quit and were on the way home, and I have a very hazy recollection of seeing it, and that's all.

Q. Were you there on the scene working at the time that this sequence of running across the top of the roof was made? A. No.

Q. Were you there with relation to the fight in the court yard with the saplings, when Papa Pietro was rescued, was filmed?

A. No, sir, I was not.

Q. Were you there working on either one of those occasions? A. No, sir.

Q. Were you there at the time the sequence was filmed when Alessandro and Dardo engaged in the duel in which Alessandro was killed?

A. No, sir. I would like to make one addition to that. I may have been there when something was going on. What I mean to say is I may have been on the pay roll, actually working the same day, but I was not there where I actually saw anything.

Mr. Dryden: That is all.

The Court: Is that all? [98]

(Testimony of Jules Garrison.)

Mr. Williams: Nothing further.

The Court: We will take a five-minute recess, gentlemen.

(A short recess was taken.)

Mr. Dryden: Will you take the stand again, Mr. Garrison? I neglected something.

Q. (By Mr. Dryden): At the time that you contacted Mr. Marcus as your attorney in this matter, you already told us he wrote this letter to Warner Bros. pursuant to your authorization; is that correct? A. Yes, sir.

Q. And at that time did you inform Mr. Marcus as to the sequences that you felt you could prove were not performed by Burt Lancaster?

A. Yes, sir.

Mr. Williams: That is objected to as hearsay and entirely immaterial.

The Court: I don't see what the materiality is, anyway.

Mr. Dryden: That is all, your Honor.

The Court: Any questions?

Mr. Williams: No questions.

The Court: That is all.

(Witness excused.)

Mr. Dryden: That is all the evidence the plaintiff has on the issue of the offer and the acceptance, your Honor, [99] which I believe your Honor indicated was the issue you wanted to hear the evidence on in the first instance.

Mr. Williams: I had anticipated, and counsel for the plaintiff indicated to me that he would take

all of today to put on his evidence, and I know he did so in good faith. I could put on Mr. Files as soon as he returns. He has stepped out for a few moments. Then I won't have any additional witnesses this morning.

Mr. Dryden: I told Mr. Williams, when I anticipated putting on my entire case, that I felt that it would take two days. That included the other issue of the stunts, and so forth. I have witnesses on that.

The Court: Are you ready to put on your other part of the case?

Mr. Dryden: Yes, sir.

The Court: Let's proceed with that, and complete your case, then.

Mr. Dryden: All right. I will call Mr. Don Turner.

DONALD TURNER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you please state your name?

The Witness: Donald Turner. [100]

The Clerk: Donald T-u-r-n-e-r?

The Witness: Yes.

The Clerk: Take the stand, please.

Q. (By Mr. Dryden): Mr. Turner, you were subpoenaed in this matter on behalf of the plaintiff; is that correct? A. Yes.

Q. What is your occupation?

(Testimony of Donald Turner.)

A. I do doubling and stunt work in the picture business.

Q. How long have you been engaged in that field? A. Approximately 20 years.

Q. Particularly, directing your attention to The Flame and The Arrow, did you work in that picture? A. I did.

Q. In that picture did you double in some sequences for Burt Lancaster? A. I did.

Q. Now, you were present here in the court room yesterday when we showed the picture, The Flame and Arrow; is that correct? A. Yes.

Q. And you had seen that picture on previous occasions? A. Yes.

Q. You had seen the picture at Warner Bros. in the [101] company of Mr. Pomroy some two or three weeks ago, hadn't you? A. Yes.

Q. When was the first time you saw the picture with relation to the time that it was photographed?

A. Shortly after the picture was completed and cut.

Q. Do you recognize the picture that you saw here in court as being the same identical picture as the first one you saw?

A. I would say so, yes.

Q. Now, particularly directing your attention to the character Dardo, do you recall the sequence in it where Burt Lancaster, in the part of Dardo, shoots an arrow which purports to hit the falcon?

A. Yes.

(Testimony of Donald Turner.)

Q. In the court yard? A. Yes.

Q. And then shortly after that Ulrich tells the soldiers to seize the boy. Do you remember that sequence? A. Yes.

Q. Now, there was a sequence immediately following that that shows Dardo running across the top of this peaked roof, shortly before the time that he is struck by an arrow. Who played the part of Dardo running across the roof with the boy in his arms in that sequence? [102]

A. I doubled for Mr. Lancaster running across the roof.

Q. And that was you portrayed on the rooftop; is that correct? A. Yes.

Q. With relation to the character Rudie, that is, the boy, do you remember who it was that you carried across the roof at that time?

A. Yes, I remember.

Q. Who was it? A. Billie Curtis.

Q. Is that Billie Curtis, the midget?

A. Yes, sir.

Q. Now, directing your attention to the sequence where the soldiers ride—or, not the soldiers, but the band rides into the court yard to rescue Papa Pietro with these sapling spears,—do you recall that? A. Yes.

Q. All right. Now, in going into the court yard there with the spears, and in this hand-to-hand encountering, what character did you portray?

A. I doubled for Burt Lancaster in the part of Dardo

(Testimony of Donald Turner.)

Q. Then you were the character Dardo?

A. I rode into the square.

Q. And in the course of that sequence there, you [103] engaged in some part in the fight with the soldiers, where you were using the sapling spears; is that correct?

A. Enough to bring the two factions together.

Q. And then in that following sequence, where the character Dardo jumps on to the oxcart and cuts Papa Pietro down, and drives the team out of the square, what part did you play in that sequence?

A. I doubled for Burt Lancaster.

Q. In the character of Dardo?

A. In the character of Dardo, and I drove one horse out, not a team.

Q. Now, getting along to the next sequence, and that is the one involving—do you recall near the end of the picture is where there is a sword fight between Alessandro and Dardo that occurs there at the time that Dardo kills Alessandro?

A. Yes.

Q. Now, that was the one that occurred in the castle shortly before the time that Ulrich was killed by the bow and arrow by Dardo; isn't that right?

A. Yes, I think so. Yes.

Q. Now, in that sword fight or duel, particularly as it related to the shots that were taken showing the two men dueling, where it was taken from the back of the character Dardo and showing the face view of Ulrich—I mean of [104] Ales-

(Testimony of Donald Turner.)

sandro, were you playing the part of Dardo in that sequence at that time?

A. I think I worked in two shots that we saw in the picture.

Q. In that duel, with your back to the camera; is that correct? A. That is correct.

Q. Were you there at the time that these purported arrow shots were made with relation to the piercing of the falcon, and the shooting of Ulrich?

A. I think I was on salary on the picture. I didn't actually see it being done.

Q. Now, with relation to these particular shots, let's take the roof shot, for example——

Mr. Williams: Just a minute. You used the word "shot" in connection with the arrow, and now you are using the word "shot" in another way.

Mr. Dryden: I will reframe it.

Q. (By Mr. Dryden): I am not speaking about shooting an arrow. You said you don't recall being there watching that scene?

A. No, I wasn't.

Q. In this situation where you carried Billie Curtis across the roof, you were on stunt man's pay at that time, were you? [105]

A. I am always on stunt man's pay, as you call it; that or a double's pay, at any time I work in the studio.

Q. Then, in addition to that, when you are

(Testimony of Donald Turner.)

working, if you do something such as a stunt, you will receive a pay adjustment; isn't that right?

A. You receive adjustments for your ability to save time, your knowledge as a person doing doubling work, and for additional—well, work, in any sense you might want to phrase it.

Q. With relation to the sequence of running across the roof with Billie Curtis, you did receive additional or adjustment pay of $145 approximately for that sequence; isn't that correct?

A. I received more money. I don't know what it was per day.

Q. In the sequence when you were engaged in the dueling, you received more money; isn't that correct? A. I always do.

The Court: What do you mean, you always do?

The Witness: My salary is known through the studios for doing fencing, as above the minimum of $70 a day, and I get a minimum of $100 a day.

The Court: When you do fencing?

The Witness: When I do fencing, because there is an adjustment. [106]

The Court: How about this roof incident? Did you get any extra pay for that?

The Witness: I did, yes, sir.

Q. (By Mr. Dryden): And with relation to the fight with the saplings, when you came into the court yard and rescued Papa Pietro, you received extra pay for that, didn't you?

A. I did.

(Testimony of Donald Turner.)

Mr. Dryden: I have no further questions, your Honor.

Cross Examination

Q. (By Mr. Williams): Mr. Turner, with reference to——

The Court: Just a moment. Mr. Turner, you were employed by Warner Bros., were you, at that time?

The Witness: Yes, sir.

Mr. Williams: Your Honor please, I hate to disagree with the witness, but he was not employed by Warner Bros.

Mr. Dryden: Now, wait a minute.

Mr. Williams: He was employed by Norma Productions.

The Court: Oh, I agree with that.

The Witness: I am sorry.

The Court: Who are you employed by now?

The Witness: I am not working right at present. I work at the various rates. [107]

The Court: Wherever they happen to need you, in any studio?

The Witness: In any of the various studios.

The Court: You may proceed.

Q. (By Mr. Williams): Your last job I think you said was with Paramount?

A. Yes, I worked a week ago. I was on the Bob Hope show at Paramount.

Q. Your work, as I understand it, for about 20 years was that of a double and stunt man?

A. That is correct.

(Testimony of Donald Turner.)

Q. And you demand and receive compensation over and above the union scale for the work you do, either as a double or a stunt man; is that correct? A. Yes.

The Court: Just a moment. Is there a differential between doubling and a stunt man's pay? You say you are a stunt man and a double. Is there a distinction in your pay when you do stunts over doubling?

The Witness: If it is a hazardous thing, it might run into hundreds of dollars or into—well, I receive a thousand dollars. To do just ordinary work that we go in and do, our minimum salary per week is $300 a week, or a minimum of $70 a day.

Q. (By Mr. Williams): Do you belong to the Screen [108] Actors' Guild? A. I do.

Q. Now, with reference to the scene that you saw of the picture here showing the men with the lances or tree limbs coming into the court yard, you saw yourself in that scene, did you, as you came into the court yard? Did you see yourself?

A. Well, I know what I did,—I mean, I can find it, where maybe someone else couldn't. I rode into the square.

Q. There was one close-up of the character Dardo there, which was Burt Lancaster, was it not?

A. Yes.

Q. As you saw it in the film, the only close-up of the character Dardo, as it came into the film, was that of Burt Lancaster?

A. That's right.

(Testimony of Donald Turner.)

Q. Yes. Now, it is a fact, is it not, in the filming of the picture you rode in with these horsemen, and then you actually rode out of the scene, and there was a melee which took place, and you later rode back into the scene, and stepped on to the cart, and cut down Papa Pietro?

A. That's correct.

Q. So that while most of this melee and fight was going on, you, in the character of Dardo, were actually [109] standing on the sidelines waiting for your entrance to come in to rescue Papa Pietro?

A. Yes, I would say that is correct.

Q. And it is correct, is it not, if I say that the only scene which actually showed the character Dardo close up in action was, where you could tell who it was in the melee, that one close-up showing Burt Lancaster? A. Yes.

Q. Now, with reference to the step-off from the horse onto the cart, is it a fact that Terry Wilson, a stunt man, was at the time holding the head of the horse that was attached to the cart?

A. Yes.

Q. And the cart was stationary? A. Yes.

Q. It was a low bed upon which you stepped?

A. Yes.

Q. And when you stepped onto that low bed, you stepped from a horse you had just instantly brought practically to a stop, and then you stepped onto it? A. That is correct.

Q. Now, in addition to the work that you ac-

(Testimony of Donald Turner.)

tually did that was portrayed on the screen that day, you also participated in setting up that stunt, did you not? A. I did. [110]

Q. In other words——

A. If you would call it a stunt.

Q. I mean the whole action? A. Yes.

Q. The whole action that took place, the melee, the fight, was set up and rehearsed? A. Yes.

Q. In other words, you determined in advance what each person would do as well as you could?

A. Yes.

Q. In view of the fact you were working with horses you had to, but you undertook to work out what each person would do and you assisted in that work? A. Yes.

Q. And it is a fact, is it not, that every man who worked in that scene was a man who was paid extra for stunt work or paid extra for his participation in that work that day?

Mr. Dryden: Just a minute. May I have that question read back?

The Court: Read the question, Mr. Reporter.

(Question read.)

Mr. Dryden: That is objected to on the ground it calls for an opinion and conclusion and is immaterial so far as the issues in this case are concerned. [111]

The Court: If he knows he may answer. Do you know?

The Witness: Yes. I will say yes.

Q. (By Mr. Williams): Now, did you yourself

(Testimony of Donald Turner.)

—was it your opinion that the action that you did personally doubling for Lancaster in that particular scene, constitute a stunt?

Mr. Dryden: Just a minute. That is objected to, your Honor, upon the ground it calls for an opinion and conclusion which is determinative of the ultimate decision in this case.

The Court: I think your objection is good.

Mr. Williams: Your Honor has in mind that this man has been 20 years in the business.

The Court: Yes. I don't care if he has been in the business 40 years. He is employed as a stunt man and if he is doing work that was represented to the public to be that of Burt Lancaster I think it is false advertising. I don't care what opinion is, whether it is a stunt or not. If they represent to the public that Lancaster did certain things and somebody else did them that is false advertising.

Mr. Williams: That is undoubtedly true, your Honor. That isn't the question involved. The question is whether this was a stunt.

The Court: I have ruled on the objection.

Mr. Williams: I offer to prove then by this witness, if your Honor please, that he is an experienced stunt man [112] in the motion picture business; that he is of the opinion that the action in which he doubled for Lancaster in the scene that has just been described, namely, the scene in the square where Papa Pietro was rescued by the outlaws, that that action was not, in his opinion, a

(Testimony of Donald Turner.)

stunt as such stunts are known in the motion picture industry.

Mr. Dryden: To which offer of proof we interpose the same objection as we did to the question.

The Court: Same ruling.

Q. (By Mr. Williams): Now, we come, Mr. Turner, to the scene in which the character Dardo seizes the boy Rudie, that scene is a scene which starts with the words uttered by the character Ulrich: "Take the boy," and at that time the character Dardo seizes the boy Rudie, throws him over the backs or heads of several persons in the scene and then fights his way to the foot of a ladder and up the ladder, across a scaffolding which later falls, and climbing up on the slope of a roof to the crest of the roof.

You recognize that sequence which I have thus far described? A. I do.

Q. Did you do any part of that sequence?

A. I did not.

Q. Was that done by Burt Lancaster?

A. It was. [113]

Q. There is then shown a distance shot against the skyline in which the character Dardo, purporting to carry the boy Rudie, walks from camera or audience right to audience left across the edge of the roof to a chimney and then beyond that chimney and disappears at the left of the camera. Do you recognize the scene as I have described it?

A. I do.

(Testimony of Donald Turner.)

Q. You played the part of Dardo in that particular sequence, did you?

A. I did, going across the roof.

Q. Which involved a run along the crest of the roof for a distance of 20 to 30 or 35 feet?

A. I would say around 25 foot.

Q. And at that time you were carrying the midget Billie Curtis? A. I was.

Q. Now, what were you actually running upon at that time?

A. If I may explain the way the roof was built——

Mr. Williams: If your Honor please, may we have a blackboard up here. We can probably set one up and it would be of assistance to the court.

The Court: Let him describe it. Maybe I can visualize it myself.

Mr. Williams: All right. [114]

The Witness: There was a set—the set was built which was what you see—what you see is actually a half of a building, the front part of it, and the roof was facing the camera. Now, in back of the crest of the roof was a platform, two 2 x 12 which from the camera you could not see and that was what I was walking on.

Beyond the platform was another—well, I think I could draw it out and show you easier than I can tell you. It is called a catwalk to put lamps on for another set. That is what it was. And that is, oh, approximately—oh, I would say four foot

(Testimony of Donald Turner.)

wide, maybe five foot wide which was just below that.

Q. (By Mr. Williams): And that second one, the one below that had a railing around it?

A. That is correct.

Q. And the railing was up almost to the height of the walk on which you carried the boy?

A. Yes.

The Court: Do I understand you ran across there carrying this midget and you were running on a platform?

The Witness: That is right. I was actually on the platform.

Q. (By Mr. Williams): And in your opinion as an experienced stunt man did that action on your part constitute a stunt? [115]

Mr. Dryden: That is objected to.

The Court: Same ruling, counsel.

Mr. Williams: We offer to prove by this witness that in his opinion as an experienced stunt man, the action which I have just described did not constitute a stunt as the word stunt is understood in the motion picture industry.

Mr. Dryden: Same objection.

The Court: Same ruling.

Q. (By Mr. Williams): Now, with reference to the duel in the corridor between the characters Alessandro and Dardo, my understanding is that that is called fencing in the motion picture industry. A. That is correct.

(Testimony of Donald Turner.)

Q. Now, you participated in preparing or working up that particular scene, did you not?

A. I did.

Q. And did you work with Albert Cavens (phonetic), the fencing master or fencing instructor in that? A. I did.

Q. Did you work with any other fencing instructors in that?

A. Not on that particular picture.

Q. Just those two, you and Mr. Cavens?

A. Cavens laid out that sequence.

Q. When you laid out the scene—you mean to say [116] that you worked out a sequence of actions on the part of both parties which would result in the filming of a duel scene, is that correct?

A. Yes.

Q. Well now, just in your own language tell his Honor how this particular thing is laid out, as you put it—what is done with it.

A. Well, it is laid out the same as you would lay out a dance routine. Each move you know. Each move that you make with your hand and with your feet you know. I think that particular duel or fight or whatever you want to call it, was approximately, maybe 35 moves or something like that. I wouldn't say exactly how many moves but it is laid out in that manner.

Q. Having laid out the moves then the participants have to memorize the moves?

A. That is correct. We worked it out then I think it was Douglas, the actor——

(Testimony of Donald Turner.)

Q. Douglas taking the part of the character Alessandro?

A. Yes, and Mr. Lancaster come in and we taught them each one of the moves to do.

Q. So that they themselves then went through, after they had practiced and learned it, they went through this entire sequence?

A. That is right. [117]

The Court: Did Mr. Lancaster participate in that sequence?

The Witness: He did.

The Court: I thought you said you did?

The Witness: I worked in two shots in it. He did, I would say—well, of the footage that we saw on the screen, he did at least 95 per cent of it or maybe more in footage. The only time I worked in it, which is a convenience for the studio——

Mr. Dryden: Just a minute. I move to strike the word "convenience."

The Court: I want to hear this, counsel.

The Witness: Which is a convenience for the studio, which we laid it out—we know the moves and can execute them probably a little easier so we worked opposite the actor, one actor, where they are shooting over your shoulder or vice versa, which just saves time and money—I mean time and money for the studio.

Q. (By Mr. Williams): It is a fact, is it not, that the way this thing was photographed, each of the two principal characters, that is, Alessandro

(Testimony of Donald Turner.)

and Dardo, played respectively by Douglas and Lancaster, went through the entire sequence?

A. They did.

Q. And photographs were taken of them and it is true also, is it not, that in the course of photographing that [118] you yourself fought against or went through the sequence against Douglas and that Cavens played the part of Alessandro, fighting or going through the sequence against Lancaster?

A. That is true.

Q. And the entire thing was shot as it was done over and over again many times?

A. That is correct.

Q. And in the final picture as it now appears, every one of the shots showing Lancaster in that picture, with the exception of two shots, actually showed Lancaster himself?

A. That is correct.

Q. And of those two shots they were shots taken facing Douglas where the character Dardo had his back to the camera and perhaps only a part of him appeared or his arm with a sword in it?

A. That is correct.

Q. And those are the ones in which you appeared? A. That is correct.

Q. Now, in your opinion in the motion picture industry, regardless of whether you did it or Lancaster did it or anybody else did it, is the fighting of a duel under such circumstances denominated or called a stunt?

Mr. Dryden: Just a minute. To which we object,

(Testimony of Donald Turner.)

your Honor, upon the ground it calls for an opinion and a determination of the ultimate issue in this case and is asking for [119] a conclusion of the witness.

The Court: Counsel, I am going to permit one of these answers to go into the record subject to a motion to strike. I am going to overrule this objection subject to a motion to strike which I will take under consideration.

Mr. Dryden: May I have the question once more?

The Court: Read the question.

(Question read.)

The Witness: Well, I would say it isn't called a stunt for this reason. That it is an achievement that you have learned. We have bouting—fencing in competition. When they do that I don't think they are doing a stunt. We rehearse the sequence and we know each move that we are doing with our hands and our feet. In competition one boy or one girl doesn't know what the other is going to do. They are working for points and without masks. The swords or foils or sabres or whatever we might use, all have dull points. So, I would say it is no more than a person bouting as we do.

The Court: Were you getting stunt pay at that time?

The Witness: My minimum salary. I always receive more than a stunt man's pay for fencing because it is something that I have learned and was taught by Mr. Cavens, Sr.

(Testimony of Donald Turner.)

The Court: But you were getting paid for extra work of that kind? [120]

A. Oh, yes, yes, sir.

Q. (By Mr. Williams): As a matter of fact you were on salary at that time as a fencing instructor and had been for several weeks?

A. I think I was on it a couple of weeks, yes, on a weekly salary being carried by the studio, which it actually took maybe a half a day to shoot the sequence and I was there for two weeks.

Q. Now, you did not portray the character Dardo at the time the arrow was shot at the falcon, did you? A. I did not.

Q. You saw the picture that was portrayed by Mr. Lancaster? A. Yes.

Q. And the same thing is true of the time the arrow was shot which ultimately struck Ulrich as in the picture and that actual shooting of the arrow was done by Mr. Lancaster, was it not?

A. Well, that is done by a special effects, the actual hitting.

Q. No, I am talking about the pulling of the bow. A. Yes, he did that.

Q. Do you know how they do the actual hitting of a person with an arrow in a situation like that?

A. Yes, sir. [121]

Q. How is that done?

A. Well, that particular one was done with a wire and a hollow arrow and they stand in back of the camera. They take a slingshot or an air gun. They use many things to shoot the arrow and it

(Testimony of Donald Turner.)

slides down the wire and into a piece of balsa wood that is put under your clothes with a steel plate in back of it and it sticks into it.

Q. And do you remember the sequence where the character Piccolo played by Nick Kurvath (phonetic) and the character Dardo played by Lancaster, were escaping and in the scene it was shown that a spear whizzed past the head of Lancaster?

A. Yes.

Q. Was that spear carried in the same way on a wire? A. No, it wasn't. It was thrown.

Q. That was thrown? A. It was.

Mr. Williams: I have no further questions of this witness.

The Court: Any further questions?

Mr. Dryden: Just one second, if your Honor please. No, no further questions, your Honor.

The Court: That is all.

Mr. Dryden: Your Honor, our difficulty again is that we are out of witnesses. We have one witness who will be the only one we will have this afternoon. I regret it. I know [122] your Honor's feelings on the time element.

Mr. Williams: May I ask counsel will that be your last witness, one more witness?

Mr. Dryden: Yes.

Mr. Swartz: Are you going to produce Mr. Pomroy?

Mr. Williams: I have no intention of calling Mr. Pomroy at this state of the record.

Mr. Dryden: I thought we had a stipulation that

insofar as the witnesses who work at Warner Bros. Studio are concerned, that they would be available and on call.

Mr. Williams: Certainly, if you want him. Counsel asked me if I was going to call him.

Mr. Dryden: No, no.

Mr. Williams: Certainly I will call him if you want him. Do you want him here at 2:00 o'clock?

The Court: Is that going to be your last witness?

Mr. Dryden: Yes, sir.

The Court: You are not going to call Mr. Lancaster?

Mr. Dryden: That will be my last witness plus some portions of a deposition that was taken by the adverse side with relation to corroboration of Mr. Turner's testimony, relative to the sequence in which he portrayed the part of Dardo.

Mr. Swartz: Maybe we can use that in rebuttal if there is any dispute. [123]

Mr. Williams: Do I understand you are not going to call Mr. Lancaster?

Mr. Swartz: I think we won't know until maybe a half hour. I would like to discuss that with Mr. Dryden before we make that answer.

The Court: Of course, I am in this court room every day, and I don't like to see time wasted by not having witnesses present.

Mr. Dryden: Your Honor admonished me about that situation, and I regret it. You can appreciate this is a kind of a nip and tuck situation with relation to the matter of exercising judgment in calling

witnesses, and, particularly, when you have not had an opportunity to see or talk to the witness until he takes the witness stand.

The Court: As I understand it, you have one more witness?

Mr. Dryden: Yes, Mr. Pomroy. He was requested to be here at 2:00 o'clock. He is an employee of Warner Bros., and they assured me that rather than tie up the studio, they would have him on notice.

Mr. Williams: That is right.

The Court: There is no deposition that can be read?

Mr. Dryden: Well, the depositions were taken by the plaintiffs here of the men going out of state. Now, the probabilities are, and I am anticipating, that the depositions [124] will be read by them, and they won't be offered in evidence except by way of rebuttal, and then only certain selected parts.

The Court: You can't offer a part of a deposition, counsel.

Mr. Dryden: As I understand the rule——

The Court: The court is entitled to the benefit of this entire testimony. You can't pick out some sentence that you think will help you and not consider the balance.

Mr. Swartz: No, but under Rule 26(d)4, I think that is the rule, we can offer that part of his testimony which we deem to be or on which we want to make him our witness, and they have the right to offer the balance, if they want to make him their witness for that portion of the deposition.

The Court: If there is going to be any deposition offered, why not read it now?

Mr. Swartz: We will stand on the record, as it now stands, with respect to Mr. Turner, without reference to that.

The Court: Then we will recess until 2:00 o'clock. That means you will stay here later this evening to make up the time.

(Whereupon at 11:40 o'clock a.m., a recess was taken until 2:00 o'clock p.m.) [125]

Wednesday, July 22, 1953, 2:00 p.m.

The Court: You may proceed.

Mr. Dryden: At this time, your Honor, the plaintiff would offer in evidence Exhibits 3 and 7, which have heretofore been marked for identification.

Mr. Williams: With reference to Exhibit 3, we object to that on the ground no proper foundation was laid, that it is simply a newspaper article, and there is no evidence as to who prepared it, and who is responsible for it.

The Court: The objection is overruled.

(The document referred to heretofore marked Plaintiff's Exhibit 3, for identification, was received in evidence.)

[See page 305.]

Mr. Williams: As to No. 7, I have forgotten what No. 7 is.

Mr. Dryden: That is the agreement.

Mr. Williams: We object to it on the ground

it is immaterial, and wholly irrelevant to any issue in the case.

The Court: That is true. We haven't heard about it in the evidence.

Mr. Williams: Then I assume your Honor has sustained the objection?

The Court: You are correct in your assumption.

Mr. Dryden: We have reviewed our notes in this matter, [127] your Honor, and at this time the plaintiff rests. I have informed Mr. Williams of that before the noon hour, so that he would have his witnesses here.

Mr. Williams: Mr. Files.

GORDON L. FILES

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name, please?

The Witness: Gordon L. Files.

Q. (By Mr. Williams): What is your occupation, Mr. Files?

A. I am an attorney-at-law.

Q. You are associated with any firm of attorneys?

A. Yes, I am a member of the firm of Freston & Files, who are attorneys of record for the defendant here.

Q. You were a member of the firm during the month of October, 1950? A. I was.

(Testimony of Gordon L. Files.)

Q. On that date did you have a conversation with a gentleman by telephone, who introduced himself as Jules Garrison? A. I did. [128]

Q. Did you, following that conversation and immediately thereafter, make notes of the substance of the conversation? A. I did.

Q. The conversation took place, I think you said, on October 9th, 1950?

A. That is correct.

Q. About how long was the conversation in length of time?

A. I would say approximately 20 minutes, although I didn't time it accurately.

Q. Yes. Are you able to give the full substance of the conversation without reference to your notes?

A. I believe I can.

Q. Will you do so, then, telling us what was said by Mr. Garrison and what was said by ourself?

A. Mr. Garrison gave me his name, and stated that he was calling for the purpose of talking to someone who was an attorney for Warner Bros. And I told him I was one of their attorneys.

He then proceeded to tell me that he had learned of some advertising which had been put out stating that Warner Bros. would pay a million dollars to anybody who could prove that Burt Lancaster had not done all of the stunts that were credited to him in the motion picture The Flame and The Arrow.

I said something to the effect that I wasn't fa-

(Testimony of Gordon L. Files.)

miliar [129] with that, and Mr. Garrison then proceeded to tell me more.

He said that he had worked on the picture as an extra; that he knew about this offer having been made, and that he believed that he could prove that Mr. Lancaster had not done certain of the stunts.

The ones he referred to particularly, and that he mentioned in that phone conversation, were three. One was, he said, climbing up on to the rooftop with the little boy. Mr. Garrison said that was done by Don Turner and by Billie Curtis, a midget. He said he did not know whether he could get those people to testify for him or not, but that he knew that those people had done that, and that they would have to say that.

The second thing he mentioned was horseback riding. He said he knew that Mr. Lancaster had not done some of the horseback riding and that the Hudkins brothers, who had furnished the horses would be willing to say that they helped Don Turner get on one of the horses for one of the sequences in the picture.

He told me that he had talked to Alan Pomroy about this; that Alan Pomroy had admitted that it was Don Turner who had climbed up on the roof of the house and that he, Garrison, had a recording of his conversation with Mr. Pomroy.

He said he knew that Don Turner's name had been mentioned on the call sheet out at the studio for certain days, [130] indicating that Mr. Turner had worked on this picture.

(Testimony of Gordon L. Files.)

He said that we would probably find out in the wardrobe a duplicate Dardo costume which had been made up for Don Turner.

Mr. Garrison said he had a piece of that costume. He then went on to say that he didn't want to make trouble for Warner Bros., although he did also state that, a little later in the conversation, that he had in the years past been a stock player out there and that one of the executives of the company he didn't like and that he thought the executive had not treated him right and he would like to see something happen to that fellow. But he said aside from that he had nothing against Warner Bros. He didn't want to give publicity to this offer and didn't want to give publicity to the things he said he could prove and he said after all: "I work in the motion picture industry and I don't want any trouble over there or any publicity over this." He said: "What I would like to do is go to New York. The theatrical season is just starting back there and I would like to get back there for the season. If you could arrange for Warner Bros. to buy me a ticket to New York and a suit of clothes and some change to put in my pocket I will go to New York and there won't be any publicity about this."

He said: "As an attorney I am sure you can appreciate the importance or the advantage to your client of *handling* [131]

He also stated that he had gone to the office of the Daily Variety in Hollywood with the intention

(Testimony of Gordon L. Files.)

of making a public proclamation of his claim for $1,000,000 but that the people at Variety had refused to publish his statement. They had suggested that he go to an attorney.

He stated that he had been to see an attorney; that the attorney apparently wanted him, Garrison, to do all the work so he didn't see any point in splitting the money to be derived with the attorney. He said: "Anyway I would rather get 10 per cent in a hurry than to get a lot more money over a long period of time."

I told him that if he was represented by an attorney of course I couldn't discuss it with him at all. He said he was not represented by an attorney; that he had merely talked to one and that the attorney had told him what he ought to do was get an investigator and go to work on this thing and then come back and talk to the attorney after he had done his work with the investigator.

He talked to me at considerable length about the advantages to Warner Bros. of giving him the ticket to New York, the suit of clothes and the pocket money to get him out of town.

I told him that I didn't know anything about this, hadn't seen the picture and didn't know the circumstances.

He said that he would like to have me look into it and [132] he would call me later. I said that was perfectly all right, that he was free to call me at any time provided he was not represented by an attorney. If he was represented by an attorney

(Testimony of Gordon L. Files.)

then, of course, I wouldn't discuss the matter with him.

Q. Was that the substance of the conversation as you remember it? A. Yes.

Q. Now thereafter did you have another talk with this same man? A. I did.

Q. And how soon after the first talk was the second talk?

A. The second one was three or four days later.

Q. Was that a telephone conversation?

A. It was.

Q. State the substance of that conversation.

A. Mr. Garrison or a person who introduced himself as Jules Garrison, and it was the same voice that I had talked to the first time, telephoned me at my office, got me on the phone and asked me what we had decided to do. I told him that I had made some investigations and it was our position that no offer had been made; that if he thought there had been any offer made it is withdrawn and he should consider it withdrawn. [133] I told him further that I had made some investigation as to how the picture had been made and that it was our understanding that Mr. Lancaster had performed all of his own stunts in the picture.

Mr. Garrison said he could prove the things that he had talked to me about in the previous conversation and that if he couldn't make an arrangement with us he was going to employ an attorney. He said that he would give us a week to think it over.

(Testimony of Gordon L. Files.)

I think again he mentioned that he would prefer to handle it directly and not have an attorney in on it. He said that if he didn't hear from us in a week he was going to go to an attorney.

Q. Was that—is that your recollection of the substance of that conversation? A. It is.

Q. And was that the last conversation you had with him on that subject?

A. That is the last conversation I had with Mr. Garrison, yes.

Mr. Williams: May I have Exhibit No. 8?

Q. (By Mr. Williams): I show you now Exhibit No. 8 in this case and ask you whether you have seen this before?

A. Yes. I received that at my office on or about October 26, 1950. [134]

Q. You received that from Mr. Obringer at the studio?

A. Yes. It was sent to me by Mr. Obringer. I think I had been told previously by Mr. Obringer that he had received it and was sending it on to me.

Q. And did you have any communication with Mr. Marcus following the receipt of that letter?

A. Yes. After the letter came into the office I placed a telephone call for Mr. Marcus. I am not sure whether I reached him. I am under the impression that I called his office and found him out and left word at his office for him to call me and I believe a short time later, the same day, Mr. Marcus then telephoned me.

Q. Did you have a conversation with Mr. Mar-

(Testimony of Gordon L. Files.)

cus at that time? A. I did.

Q. And what was the substance of that conversation?

A. I stated to Mr. Marcus that we had received his letter dated October 20th, 1950; that our position was that Warner Bros. had made no offer; that if any offer should be deemed to have been made in the past, it had been revoked, and, furthermore, I told him that Mr. Garrison was mistaken as to the facts, that Mr. Lancaster had actually done all of his own stunts in the picture, The Flame and The Arrow.

Q. Was that the substance of the conversation?

A. Yes, it was. [135]

Mr. Williams: You may cross examine.

Cross Examination

Q. (By Mr. Dryden): Mr. Files, I think you said you made notes and memoranda of the conversations?

A. I dictated a rather lengthy memoranda of the first conversation.

Q. I notice that you had what would appear to be a memorandum with you as you took the stand?

A. Yes, I have it here with me at the stand.

Q. And I assume you refreshed your memory from that prior to taking the stand, at least some few weeks or days? A. That is correct.

Q. May I see it? A. Certainly.

(The memorandum was handed to counsel.)

(Testimony of Gordon L. Files.)

Q. In the course of that conversation, he told you that one of the reasons he wanted to discuss this matter with you was he knew that if there was any publicity or litigation about this matter, he would be blackballed in the industry; is that right?

A. I don't recall the use of the word "blackballed." He may have said it. But he said something along that line.

Q. To the effect that he would never be able to work [136] again in the industry for any company? A. He said that, yes.

The Court: And when he spoke to you over the telephone the first time, did he say anything about accepting the offer?

The Witness: No, he didn't use that word.

The Court: Did he say, in substance, he accepted the offer?

The Witness: No, he didn't.

Q. (By Mr. Dryden): Well, he told you that he had seen that publicity with relation to the million-dollar offer, didn't he?

A. Yes, he did.

Q. And he told you that he could prove that Burt Lancaster didn't do some of the stunts in the picture, didn't he?

A. Yes, he said that.

Q. And he told you that he had called Warner Bros. and had been referred to you?

A. I am not sure that he said that. If that is in the memorandum, that is correct.

Q. Well, I didn't notice it in the memorandum,

(Testimony of Gordon L. Files.)

but do you recall such a thing in the conversation, on the basis of which he called you?

A. No, I have no recollection of his telling me how he happened to call our office. [137]

I know when he called our office he just asked the switchboard operator to talk with the attorney for Warner Bros. and so she picked one and put me on the line.

Q. In that respect, in one of these conversations he talked to you about the fact that in view of what he felt he could prove, rather than to wait a longer time for more money, he would be willing to compromise his claim by reason of this publicity that he claimed would be made; isn't that right? A. No.

Q. Didn't you tell us a few minutes ago that he discussed the proposition of his taking 10 per cent?

A. He mentioned in passing that it would be better to take 10 per cent than to call an attorney in on it and have to go through a trial.

Q. Well, he was then discussing with you the proposition of receiving money by reason of what he had discovered with relation to this picture; isn't that correct?

A. That isn't the way I took it.

Q. Well, when he called you up, he told you he had seen the publicity for a million dollars; isn't that right? A. Yes.

Q. And he told you that he felt he could prove that Burt Lancaster hadn't done all the stunts;

(Testimony of Gordon L. Files.)

isn't that correct? A. Yes. [138]

Q. And he discussed the question of a million dollars, and also the question of 10 per cent of a million, didn't he?

A. No, I wouldn't say he discussed that.

Q. Didn't he say he would be willing to take 10 per cent rather than to wait for litigation?

A. No. He said it would be better to take 10 per cent than wait for litigation, but what he wanted was to go to New York, some change in his pockets, and a new suit of clothes, and then he would forget about it.

Q. He would forget about his claim with relation to this matter?

A. I assumed that was what he was going to forget, among other things.

Q. And in the course of that discussion the term of 10 per cent was used?

A. Not at that point, no.

Q. Was it used at a later point?

A. I can't tell you with reference to before or after some other phase of the conversation. The reference to 10 per cent was simply in his philosophy as to whether or not you ought to hire a lawyer in a matter of this kind.

Q. At the conclusion of that conversation, he told you that he would call you back at a later time, and determine what you were going to do with relation to his claim; isn't that right? [139]

A. Yes, he did.

Q. And with relation to this second conversa-

(Testimony of Gordon L. Files.)

tion that you had with him, did you make any memoranda or data relative to that second conversation?

A. I just made a couple of pencil lines on rough paper at the time. I did not dictate a lengthy memorandum, as I did with respect to the first one.

Q. At what date did you say you received this call?

A. The first one was October 9th. The second was October 12th.

Q. As soon as you got the note from him, you immediately called the attorney out at the Warner Bros. Studio, Mr. Obringer?

A. On October 9th?

Q. Yes. A. Yes, that's correct.

Q. And he informed you that he would talk to Mr. Evelove, who was the head of the publicity department; isn't that correct? A. Yes.

Mr. Dryden: I have no further questions.

Mr. Williams: I have no further questions.

The Court: That is all.

Mr. Williams: Oh, yes, I have, your Honor. There is one matter I neglected to ask him about.

Redirect Examination

Q. (By Mr. Williams): With reference to Exhibit No. 8, was that returned to you? A. Yes.

Q. I noticed some notes in pencil at the bottom of Exhibit 8. Were those made by you?

A. They were. They are in my handwriting.

Q. Were they made at the date they bear?

(Testimony of Gordon L. Files.)

A. Yes, they were made immediately following my telephone conversation with Mr. Marcus on October 26th.

Mr. Williams: That is all. I have nothing further.

The Court: That is all.

(Witness excused.)

Mr. Williams: Mr. Lancaster, please.

BURT LANCASTER

called as a witness by and on behalf of the defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Williams): Mr. Lancaster has already been sworn as a witness in this case. [141]

Mr. Lancaster, I direct your attention to the making of the picture, The Flame and The Arrow, and I want to ask you particularly as to certain sequences in the picture, and as to what, if anything, you personally did in reference to them.

In the matter of the order of the picture, as I recollect, the first place at which the character Dardo appears is at a time when Dardo, accompanied by Rudie, and having the body of a deer across the saddle, rides down into the village. Do you remember that sequence?

A. Yes, I do.

Q. And that was the opening sequence in the picture as far as you were concerned?

(Testimony of Burt Lancaster.)

A. Just about.

Q. Did you yourself portray the role of Dardo riding into town? A. Yes, I did.

Q. And was the role of Rudie played by the little boy, Gordon Gebert? A. Yes.

Q. For convenience I will just use the word or name Gordon from now on. He was a little boy eight or nine years old? A. That is right.

Q. Now, the next sequence that I remember was the [142] sequence in which you drew a bow and arrow and fired it into the air—that is the character Dardo. Did you perform that action?

A. I performed the action of shooting the actual arrow, that is right.

Q. And the next thing I remember in sequence is the point at which you and the character Piccolo played by Nick Kravath were in the blacksmith shop or barn and at a particular time Nick Kravath chins himself up into the loft and thereafter he springs from the loft into your arms, you catch him and go into a back somersault?

A. That is correct.

Q. Now, what is the name of that particular action? What do you in acrobatic work call that?

A. Well, there is no particular name for the stunt. I think you have described it fairly accurately. He jumped from the loft into my arms into a straddle position across my shoulders and I sank with him on the catch and flipped him into a back somersault, all in one motion, what we call "in swing time" which means I didn't catch him,

(Testimony of Burt Lancaster.)

stop and then perform the trick. I caught him on the bound and threw him.

Q. And you yourself performed the portion of that that is shown as being performed by the character Dardo?

A. Yes. I remember I rehearsed that special little [143] trick for three weeks.

Q. Now, that particular matter is a piece of acrobatic work? A. Yes, it is.

Q. And let me ask you this. Have you had any experience in acrobatic work?

A. A great deal of experience.

Q. What has been your experience in acrobatic work?

A. I started in acrobatic work on an amateur basis back in 1932 at New York University. In 1934 I worked in my first professional job in a circus, a circus called Kay Brothers. I remained in the circus field through 1938 and after that period I worked until 1941 as an acrobat in vaudeville, in what we call fairs, carnivals, night clubs, hotels, cafes, et cetera.

Q. Doing what type of acrobatic work?

A. Doing what is known as horizontal bar work and another kind of act known as perch pole act, a balancing perch pole act. The people in the courtroom will remember the picture showing an act where Nick Kravath balanced me at the top of the pole and the horizontal work just at the last of the picture was work done on horizontal bars.

(Testimony of Burt Lancaster.)

Q. In other words, you had been doing horizontal work and perch pole type of work since 1932 and since 1934 professionally? [144]

A. Yes. And in addition to that I engaged myself in other forms of acrobatic work such as a bit of hand balancing and some tumbling and the kind of work that was employed in the Three High which was the shot in the picture where I held Nick Kravath and the bear on my shoulders and we did the forward roll.

Q. And that is a recognized type of acrobatics?

A. Any Three High——

Q. In 1941, up until about 1946, you were in the Army, were you?

A. September 1941 to 1945.

Q. And thereafter you did what?

A. Thereafter when I returned home from Italy I managed to quite accidentally get into a Broadway play and from the success of that play I was engaged for picture work and I came out to Hollywood and got into the picture business.

Q. And from 1946 to the present time you have been in picture work? A. That is right.

Q. And among the pictures you have made are The Flame and The Arrow and what other pictures involving the display of your acrobatic skill?

A. Specifically two pictures, one The Flame and The Arrow and another one done after that called the Crimson [145] Pirate.

Q. In both of those you display your skill as an acrobat? A. That is right.

(Testimony of Burt Lancaster.)

Q. Now, in the sequence of the picture, after we leave the sequence where Nick—by the way,—withdraw that.

By the way, Nick Kravath who appeared in the role of Piccolo in this picture is a man who has been your partner in circus and vaudeville work and acrobatic work through these years?

A. Nick Kravath and I did an act all through my professional years working as acrobats strictly.

Q. Now, the next sequence which I remember in which some work of an athletic character was done by you, is a sequence in which, after having the hawk come into the public square you yourself or the character Dardo, has some action following some words by the character Ulrich, who was portrayed as the villain of the play, Ulrich uses the language "Take the boy." And with that some action occurs.

Now, will you describe that action on the part of Dardo at that time?

A. Yes. Ulrich says "Take the boy" and the camera cuts to me looking worried and frightened. A soldier runs in to take the boy. I grab him by the shoulders and throw him into the crowd. I throw him over my head and over the [146] crowd to a friend on the other side of the crowd immediately following which I turned and Nick Kravath places himself in what we call a foot pitch position. I step into his hand. I will have to demonstrate this. He is in this position. I step into his hand, putting my foot into his hand and he

(Testimony of Burt Lancaster.)

throws me over his head, over the crowd and I land down in the crowd where the boy is waiting with one of the characters and I pick the boy up, throw him on my shoulder, run up a scaffold which is an incline of roughly 45 degrees and make a right-hand turn and continue on the same kind of incline up to a portion of the roof and around a chimney where I throw the boy and disappear after him.

Q. Now, was all of that action done by you personally? A. Yes, it was.

A. A subsequent time there appears in the picture a shot of the character Dardo in the distance —against the skyline. He is escaping along the crest of the roof for a distance of over 20, 25 or 30 feet, apparently carrying the boy. Was that particular position where the character Dardo escapes along the crest of the roof, was that particular portion in the picture portrayed by you?

A. No, it was not.

Q. Did you yourself so far as your recollection goes, actually portray that scene or any part of it in either another take or in the rehearsals? [147]

A. Well, the only recollection that I honestly have of it is that at one particular point I made a jocular remark to——

Mr. Dryden: Just a minute. I don't like to interrupt the witness but I object to any remarks made outside of the presence of the plaintiff.

Mr. Williams: I think that is correct. That wasn't my question. I wanted to know what your

(Testimony of Burt Lancaster.)

recollection is, whether you did any part of that particular act where the character Dardo is escaping along the roof.

Mr. Dryden: That is objected to. I want to object to that on the ground it is immaterial unless it relates to the sequence actually shown to the public with relation to the character Dardo running across the top of this roof.

The Court: I think the witness testified he didn't do the running across the scaffold.

Mr. Williams: He testified he didn't do the portion which is portrayed in the picture. I am asking him whether he did the actual action himself.

Mr. Dryden: Now, that is my point, your Honor. In other words, the witness has testified that he didn't do the part going across the roof. Now as I understand the purported question of counsel is whether or not he had done that at some other time or on some other shot in the same sequence and not the one that was shown to the public. That is my [148] position, your Honor, and I maintain that would be immaterial to any issue in this case.

Mr. Williams: Not in view of the language——

The Court: Counsel, I don't know. I have been listening to this case with a great deal of interest. I can't see where a man running across a scaffold there, and while there may have been some trick photography, where he is running across the top of the roof is a stunt.

When we get down to the meaning of a "stunt"—

(Testimony of Burt Lancaster.)

Mr. Williams this morning wanted to use it in the language of the industry but I want to use it in, I think, the language of a layman. I think it has to be used in the language of a layman. There was no stunt in running across a scaffolding. That would not come within the classification of a stunt.

Your contention is that the part of going up the ladder with the boy over his shoulder was a stunt but this witness has said he did that and your witness this morning admitted that, that he received the boy and carried him up the ladder and then made it appear like he was running across the top of a roof.

Mr. Dryden: Yes, your Honor, and we maintain, of course, that running across the roof with a man over his shoulder as shown in this picture here, with arrows being shot at him as he is making his escape in the eyes of a layman is a stunt.

The Court: Well, this court isn't going to agree with [149] you, counsel.

Mr. Dryden: Now, with relation to the particular question——

The Court: Let us find out what he did and we will save the argument for afterwards.

Mr. Williams: I think there is a question which remains unanswered.

The Court: I think his answer is clear. As I understand this witness carried the boy up the ladder and this other man who testified this morning, took the boy and ran across the top of the roof, as he described it on a scaffolding which made

(Testimony of Burt Lancaster.)

it appear as though he was running on top of the roof.

Mr. Williams: That is correct.

The Court: That is correct, is it not?

The Witness: Yes.

Mr. Williams: My other question was whether he himself has any recollection as to whether he performed that particular action.

The Court: I think he testified he didn't.

The Witness: No.

Mr. Williams: I don't know.

The Witness: Well, conditionally I might add that when we first started this picture I wanted it to be made perfectly clear that I would be doing my own stunts. I was thinking [150] in this in terms of my career as an actor. It is characteristic when an actor takes that postion a studio feels that, well, maybe he will and maybe he won't, so they are prepared to have stunt men standing by in the event he can't do this kind of thing.

Now in my opinion I felt that the situation of running across the roof did not really constitute a stunt which was why——

Mr. Dryden: Just a minute, please, Mr. Lancaster. I don't like to interrupt the witness but I submit that these answers are not responsive and they are full of opinions and conclusions.

The Court: I realize they are opinions. I have ruled with you generally on what he considered a stunt and what the public may consider a stunt. I think they are two different things. The news-

(Testimony of Burt Lancaster.)

reel refers to it and I think in the usual acceptance of the meaning of the word and not what is meant by the word in the profession.

I want to say now that I don't think walking across that scaffolding with a boy over his shoulder is a stunt. Now, I just want to make that clear.

Mr. Dryden: I am glad you did.

The Court: I don't want any mistake about that. I don't think anybody up there with a boy over his shoulder walking on a protected walk is a stunt. [151]

Mr. Dryden: Of course the portrayal is——

The Court: I realized the portrayal indicates this man is walking across a roof but we all recognize what we might call trick photography and we are not trying a case of trick photography here.

Mr. Dryden: That is true, your Honor, but nevertheless—will your Honor hear me out on this particular issue? Where you have a situation in which is portrayed a person and incidentally if you recall the picture it wasn't a person walking across a roof but a person running across the top of a peak roof.

The Court: But that was the trick photography.

Mr. Dryden: Insofar as the trick photography was concerned, it was only by reason of the platform down below, but there was no trick photography there.

The Court: Only the roof showed but they had a walk there for him to run on.

Mr. Dryden: Well, I mean from the standpoint

(Testimony of Burt Lancaster.)
of the vision to the layman that was a man running across the top of the roof.

The Court: I don't think there is any stunt about running.

Mr. Dryden: Well, of course, I am not going to argue that point further at this time.

The Court: I have tried to tell you not to argue now. [152] I will listen to your argument later and that is why I am giving you advance notice that as far as has been portrayed to me, if your case relies on that being a stunt you are out of luck.

Mr. Dryden: Well, of course there are several other sequences.

The Court: I realize that, but according to the testimony he ran up a ladder at a 45-degree angle to that roof. That might be in the classification of a stunt but this witness testified he did it and so did your witness. But after they reached the top and walked across a board walk, you might say, there isn't any more stunt to that than walking into this courtroom.

Mr. Dryden: I appreciate your Honor's informing me of your position. At the time of argument I will go into that.

The Court: I am trying to be frank with counsel and there is no use of getting into an argument with me now because if you do I will probably do most of the talking.

Mr. Williams: I will proceed to the next question.

(Testimony of Burt Lancaster.)

Q. (By Mr. Williams): The next sequence that I remember in the picture——

The Court: Let us take up one of the sequences that has been raised here and claimed not performed by this witness.

Q. (By Mr. Williams): Well, there is one other sequence [153] that I remember that has been discussed here in which the character Dardo is shown discharging an arrow in the direction of the air—up in the air and subsequently it appears that a falcon has been pierced by the arrow and drops down to the earth. Who was the character—who actually drew the bow and discharged the arrow which was discharged in that sequence?

A. I was.

Q. Yes. Now, with reference to the next scene which is discussed here, it has been particularly discussed by counsel for the plaintiff, the scene where the outlaws arrive to rescue Papa Pietro in the square. The outlaws arrived on horseback, carrying long limbs of trees which are in the form of spears, and the character Dardo is shown in that sequence in one close-up, and on a horse entering the square. Were you the character who was shot in that close-up?

A. In the specific close-up you have mentioned, I was the character, yes.

Q. And that is the only place in the picture where up until the final rescue of Pietro, the only place where the character Dardo appears specifically in that scene? A. That is correct.

(Testimony of Burt Lancaster.)

Q. Now, at a later time in that same sequence, that is, in this same village square when the character Papa Pietro is rescued, Papa Pietro is standing on a platform of a low two-wheeled cart, he has a rope around his neck which is [154] attached to a scaffold, his hands are tied, he is in a position to be hanged, and at that point the character appears riding on a horse, brings the horse to a stop, and steps on to the platform and reaches up and cuts the rope, and then down on his knees seizes the reins and starts to drive the horse out of the court yard, and as he is driving the horse, the horse starts and goes into a trot, and he rises to his feet holding the reins on this cart. That particular sequence, was that performed by you?

A. No, it was not.

Q. It was not performed by you. Now, in your opinion, would that sequence constitute a stunt?

Mr. Dryden: That is objected to. It calls for an opinion, and would be the ultimate determinative issue in this case.

The Court: I want to say, Mr. Williams, I have felt that the meaning of that newsreel is the common meaning and acceptance of that word. Now, whether this witness thought it was a stunt or not, I don't think it would be binding on the public who saw that ad.

Mr. Williams: I appreciate the force of your Honor's position. I realize that, and yet I feel, inasmuch as it is a matter relating to the motion picture industry, and as to a motion picture, that

(Testimony of Burt Lancaster.)

it would be of assistance to the court and would show the court what the word "stunt" meant [155] in the motion picture industry. That is, I have given the matter a little thought, and without being at all too insistent, I want to make the record of the thing, because I think it may be of assistance to your Honor.

The Court: I don't think it will be of any assistance to me, so far as I am concerned. I am going to sustain the objection.

Mr. Williams: I want to make an offer in that connection, then, that this witness will testify that in his opinion in the motion picture industry the word "stunt," as used in the industry, does not apply to the particular actions which we have just discussed, that is, the action of the rescue of Papa Pietro.

The Court: The record so shows.

Mr. Williams: Now, I may be able to save some time, if your Honor prefers. I intended to go over these other acrobatic feats which were performed by Mr. Lancaster, and particularly in view of some of the allegations of the complaint, although there has been no proof on it. I would like, briefly, if I may, to cover them, without going into them too much, and I won't try to follow the exact sequence of the picture, because that may take a little too much time.

Q. (By Mr. Williams): For instance, let me ask you this: Did you execute the somersaults and pirouettes from horizontal bar to horizontal bar,

(Testimony of Burt Lancaster.)

six in all, swinging from each bar to [156] the other, upstanding on one foot, and on the last bar drop to a ledge or cornice?

A. Yes, I did.

Q. You performed that yourself, personally?

A. Yes, I would like to clarify it, briefly. It wasn't one leg, it was two legs. I didn't drop down to a ledge. I dropped down to what we call a tick, about sixteen feet underneath me. I completed the somersault and dropped to the tick.

Q. Now, isn't it a fact that you did the full action shown where you climb onto a pole, and climb up the pole which is held on the head of the character Piccolo, enacted by Nick Kravath and at that point you support yourself with your legs and stand with your arms out in the air, and then later throw yourself or pull yourself around until your feet are out in a horizontal position, forming what is known as a flat? A. Yes, I did that.

Q. And that is an action which you and Nick Kravath had done for years in your business, is that correct? A. That is true.

Q. Now, with reference to the point from where you swing from a drape high on the wall of the interior of the castle, and swing from that, and down, and drop onto the floor, did you yourself personally perform that? [157]

A. Yes.

Q. And did you personally perform the feat of climbing a rope from the ground and up to a window? A. Yes, I did.

(Testimony of Burt Lancaster.)

Q. Where you are going up for the purpose of going to help your boy? A. Yes.

Q. And Kravath also did that?

A. Yes, sir.

Q. And is that a difficult feat?

A. Yes. We did it without the use of the legs, as we call it, hand over hand, strictly without the use of the legs.

Q. Now, with reference to the scenes where you and Nick Kravath fight your way out of the great hall, where you seize these flambeaux with the flaming torches and fight all of these soldiers that are seeking to prevent your escape, with a great deal of action on the floor, and leaving the floor, did you yourself perform all of that portion which is shown as having been performed by the character Dardo? A. Yes, I did.

Q. And with reference to the point at which you and Kravath together get Kravath up on to the chandelier and start him swinging, the portion of that done by the character Dardo, was that done by you? [158] A. Yes, it was.

Q. And with reference to the wall-scaling, which appears from time to time in the picture, where you jump and seize a wall and then work your way up on the thing, was that done by you?

A. Yes, it was.

Q. In the forest, when you and Kravath stopped the Lady Ann, to take the whip from her hand, and where your arm is in a sling, and with your arm in a sling you do a back somersault off a limb

(Testimony of Burt Lancaster.)

coming down onto the ground, did you personally do that? A. I certainly did.

Q. And because of the fact that your arm was in a sling, was that a difficult feat?

A. Yes, it was. It kept me from balancing myself in the air, in the event I did not do the somersault just right, it would make it difficult for me to adjust myself, because I was strapped in, so to speak.

Q. Now, with reference to the fighting that took place in the final scenes which led up to the victory over Ulrich, and you came out getting the girl——

The Court: You did come out getting the girl?

The Witness: I was contracted for it, sir.

Q. (By Mr. Williams): Now, Mr. Lancaster, there was a terrific melee and battle that takes place in the great hall [159] and in the corridors, and various places, on the tops of walls, in connection with that did you yourself do all of the part portrayed by Dardo in that action?

A. Yes, I did.

Q. Including the running up of the stairs, fighting your way up the stairs, throwing soldiers over your back off the stairs, and pushing them sideways, and doing all of the other action shown there, —you did all of that yourself?

A. Yes, I did.

Q. Incidentally, in connection with that particular sequence in which you were using the torches,

(Testimony of Burt Lancaster.)

you got so realistic you actually burned one of the men with the torch, didn't you?

A. That is true. Sailor Vincent, a stunt man.

Q. Now, to get down to the question of these three men high scene, that is the scene in which you are the ground man or bottom man, Nick Kravath, playing the part of Piccolo, is the next man, and on top is another acrobat who is dressed in a bear's costume, and as you stand in that position, all three of you at the same time lean forward and fall to the ground, and at the last instant each of you completes a roll on the ground and comes up standing. In that scene, you took the character Dardo, and enacted that particular feat, did you?

A. I was the understander. I held the other ones. [160]

Q. You were the understander. That is what I understood, too. A. It is a funny art.

Q. Now, we come to the duel scene between you and the character Alessandro, which is played by Douglas, the actor Douglas, that duel scene in which you fight in the corridor and in which he is finally shown to be killed. Did you yourself do the entire action of that duel scene so far as the part Dardo is concerned?

A. Yes, I did, and it was photographed that way.

Q. And in connection with that, did Don Turner also help in the matter of the preparation of that scene, and in laying it out? A. Yes, he did.

(Testimony of Burt Lancaster.)

Q. And doing the fencing?

A. Yes, he helped.

Q. There was no part of the actual fencing in that particular sequence that you did not yourself personally do, was there?

A. I did the entire sequence, yes, sir.

Q. Now, that sequence includes a point at which, after you have cut the lights down and the place is in the dark, or semi-dark, with enough light showing to show the character Alessandro, and he stumbles and lies on the floor there, and at a certain point the character Dardo is catapulted through [161] the air on to him, and seizes him, and it fades into the dark,—did you yourself do that particular action—— A. Yes, sir.

Q. ——of falling on to him in that fight sequence? A. I did, sir.

Q. Now, with reference to the sequence when you walked across the pole, first Nick Kravath playing the character Piccolo, and you afterwards walked across the pole which was stretched across the kitchen of the great castle, and you held the pole tight while Nick Kravath walked across the pole, and Nick Kravath held it while you walked across, and at a certain time you apparently lost your balance, and then caught yourself and swung yourself from the pole over to the wall, did you yourself do all of that particular action?

A. Yes, sir.

Q. And is that a part of the acrobatic work in which you have special training?

(Testimony of Burt Lancaster.)

A. Yes, it is.

Q. Now, with reference to the arrow, or the shooting of the arrow, in which it is shown that Ulrich is killed at the time when he is seeking to escape, carrying the little boy and attempting to protect himself from attack by using the little boy as a shield,—did you yourself perform the actual act of drawing the bow and discharging the arrow which is shown to be discharged in that scene?

A. Yes, I did.

Q. As a matter of fact, the arrow which actually struck the character Ulrich was not shot by anybody, was it?

A. No, it was done by the special effects department on a wire with an air gun.

Q. As a matter of fact, under the regulations of the motion picture industry, you are not permitted to shoot an arrow which is seen in the picture to strike a person? In other words, there has got to be a cut between the discharging of the arrow and the striking of a person, because it isn't permitted to show it in one sequence; is that correct?

A. I wouldn't know about the technique.

Mr. Dryden: I object to that as leading and suggestive.

Mr. Williams: The witness testified he didn't know, so I guess I will have to testify myself.

Mr. Dryden: That is what you were doing a fair job of when I objected.

Mr. Williams: I thought I was, too.

(Testimony of Burt Lancaster.)

Now, I think, if your Honor please, I have covered all of the sequences as to which there is any question in this case, and for the purpose of showing what actually was done in as much detail as I can.

The Court: You made a good witness, Mr. Williams.

Mr. Williams: Thank you. It is very seldom a lawyer does that, too. [163]

I have no further questions. Oh, just a moment.

The Court: Is that all?

Mr. Williams: That is all, your Honor.

The Court: We will take a five-minute recess at this time.

(A short recess.)

The Court: You may proceed, gentlemen.

Cross Examination

Q. (By Mr. Dryden): Mr. Lancaster, directing your attention to this escape across the top of the roof, would you tell us approximately how high the top of that roof was from the ground?

A. I would say it was somewhere in the neighborhood of 20 to 25 feet.

Q. Am I right in my understanding that that side of the roof portrayed to the public looking at the picture would indicate that was the near side of a peak-pointed house; is that correct?

A. Yes, a peak-pointed roof, I think you could say.

Q. Now, on the far side where this platform

(Testimony of Burt Lancaster.)

was, there was a complete drop-off. In other words, the other half of the roof was not actually constructed, was it?

A. I don't know exactly. I don't remember.

Q. As a matter of fact, on one occasion you actually [164] played the sequence of carrying the boy and escaping over the top of the roof, as is shown by Don Turner in the final picture; isn't that right?

A. I am sorry. Your question confuses me.

Q. Did you in one sequence, which is not portrayed in this film, act the part of Dardo running across the top of the roof?

A. Of course, you are not referring to anything shown in the film?

Q. No, I am not. I am referring to what was done there in the sequence, but not shown to the public.

A. You mean, did I engage in a practice run, or did I do it in practice?

Q. Did you do it, where it was shot by the camera?

A. I don't remember that I did. I have no recollection that I did.

Q. Would it refresh your memory in that respect if the records of the studio showed, at least according to the admissions, that in one of the takes you performed the role of Dardo with Billie Curtis doubling for Rudie, and proceeded across this roof?

A. I don't remember that particular take.

(Testimony of Burt Lancaster.)

Q. Did you make any practice runs across that roof with Billie Curtis?

A. Well, I will have to answer that question qualifiedly. [165] At one point, as I started to say before in response to Mr. Williams, I remember picking Billie Curtis up and kidding him about getting a little fat, since he was a little stouter through the waist than the boy for whom he would be doubling in this sequence, and picking him up to my shoulders and running there, but I can't remember whether I did it on the ground or did it on the scaffold.

Q. Now, how wide was this scaffold?

A. I don't know, since I don't remember having been there. I don't know. I think it was two lengths of 2 by 12's. That is, it would be 24 inches in width, but I am not sure.

Q. And you say about 25 feet off the ground?

A. Something like that.

Q. And there were no barricades, at least that came up as high as the hip of any person running along there, were there?

A. You see, I don't remember anything about that, so I couldn't say.

Q. Now, let's take this sequence when they entered the court yard to free Papa Pietro. As I understand it, you say that the riding sequences showing you leading the band with your sapling spears, so to speak, that was performed by you?

A. The sections that show me in close shots in

(Testimony of Burt Lancaster.)

which [166] my face is recognizable, I did all those shots.

Q. Now, let's start from the time you leave the forest. A. Yes.

Q. Without reference to the close shots. What about the shots that showed Dardo, the character Dardo, were there any of those shots that were played by Don Turner, from the time you left the forest until you got to the court yard?

A. To my recollection, Don Turner didn't do any of those riding sequences.

Q. Did anyone else do those riding sequences in the role of Dardo?

A. I would like to ask you to be specific about that, because I know the film very well, and I can point out any sequence you mention, if you will mention the specific cut in the film.

Q. The cut I am referring to is when you find out that they are going to hang Papa Pietro, and you leave your camp and you ride to the place where you are about to enter the court yard.

A. Yes.

Q. Were there any persons who had the part of Dardo other than yourself in the ride from the camp to the point where you were going to enter the court yard?

A. In the shot where I leave the actual campfire sequence, I ride on the horse, and then I believe there is a [167] shot of a man riding in the distance toward the square. That is a long shot of

(Testimony of Burt Lancaster.)

another person riding the horse, and the impression is to believe that it is me doing that.

Q. In other words, that is the fast ride that was made to the rescue?

A. That's right. It wasn't to the rescue. It was merely to investigate the situation. He then returns, if you recall, and then takes the band with him.

Q. Thank you. As I understand it, in the first sequence you yourself rode the horse and went over to investigate the situation; is that true?

A. No, that isn't.

Q. Dardo did?

A. Dardo, of course, did all the riding, but if you will specify Burt Lancaster and someone else.

Q. Maybe I can clarify it this way: In that first sequence the character Dardo goes over to the square by himself to investigate the situation?

A. No, that is not true.

Q. What is it?

A. As I pointed out to you, I thought clearly, I first got on the horse and I rode out of the forest, or rode out of what appears to be a forest. That shot was staged on a stage at Warner Bros. Now, then we went out to a ranch, where we were in a real forest, and you see one or two, or I don't [168] know how many long shots, of a man riding at a distance, it is myself leaving the forest. In that scene the other man riding is someone other than Burt Lancaster.

Q. Riding through the forest?

(Testimony of Burt Lancaster.)

A. That's right.

Q. Now, in the next sequence where Dardo comes back and gets his group to come to the rescue, in that ride up to the place where you arrive at the square was there anybody there that wore the costume of Dardo other than yourself?

A. Only in the extreme long shots in which you either saw a single man or rather in this particular instance now only a group was there—another person portraying the so-called role of Dardo.

Q. That was when the group went to the rescue?

A. That is right.

Q. All right. Now, at the time—do you recall who it was that portrayed Dardo in that sequence?

A. No, I don't. It was not Don Turner.

Q. Now, at the time the sequence shows the band entering the courtyard with the sapling spears for lack of a better description.

A. They were called tree spears, if that will help you.

Q. Tree spears. And in that sequence and the character Dardo there is a picture of Don Turner portraying [169] Dardo, isn't that correct?

A. There is one specific shot of Don Turner, two to be exact, the one where the old man was hanging, as Mr. Williams elucidated before, in which you see the back of a character ride up, stop, step off onto a cart, cut the rope and now begin to ride out all in that one rather tight shot, and it was on the back of that character and then there is another shot immediately following, a larger shot of the

(Testimony of Burt Lancaster.)

square with action in the foregoing showing that same cart in the background. In other words, continuing the continuity of the cart's progress and showing it begin to ride out of a street and the picture fades out so those are the two cuts and only two cuts in that entire square sequence in which Don Turner is portraying the character Dardo.

Q. And then you state that it is not true that insofar as leading the group in and beginning the hand to hand encounter with tree spears, that Don Turner portrayed the character of Dardo?

A. Not to my knowledge. I don't say that is not so but not to my knowledge.

Q. Then from your standpoint at least, within your own knowledge, you are not aware of any sequence in which Don Turner portrayed the part of Dardo in the hand to hand encounter there as he entered the courtyard?

A. He definitely did not in the hand to hand encounter [170] for this reason. There is a shot upon the entrance of the outlaws into the square and a rather long shot and there is a closer shot somewhere in the action of the character of Dardo riding toward the camera and thrusting his spear at one of the soldier's faces. That character is myself. It is the only cut of me in that particular sequence.

In the action that ensues and follows many of the leading characters in the piece—that is the outlaws and so forth, and of course the soldiers are engaged in action, they are rather close shots and you see

(Testimony of Burt Lancaster.)

in all these shots, you see the various characters who really portrayed themselves in the picture doing it and not actual doubles.

In that particular sequence, in this particular action there is no recorded photographic presence of Dardo at all, so nobody could have done Dardo then because Dardo was simply not in the film. Is that clear?

Q. Yes.

A. Then Dardo reappears in the film when you have the shot of Papa Pietro at the cart, so that is the first time Dardo reappears—appears, rather, in the square after you have seen the initial shot of Dardo as portrayed by myself coming into the close shot.

Q. Now, let us take this deuling sequence. I believe Alessandro, at least in the dueling sequence, was Robert Douglas, is that right? [171]

A. That is right. Well, may I say this. Robert Douglas played the character of Alessandro. There were two if I might say so, two Alessandros.

Q. The one that dueled and the one that——

A. Well, Mr. Douglas did some of his own dueling also. He may have done all of it for all I know, actually know.

Q. Now, in that would you describe the sabres that were being used?

A. I don't know that they would be called sabres.

Q. Will you describe them?

(Testimony of Burt Lancaster.)

A. Well, they were swords. I don't know the technical name for them, heavy steel swords.

Q. Do you recall when that sequence was shot that Don Turner was likewise dressed as the character Dardo?

A. Well, yes. There were a couple of shots in the picture, shots which were shooting on Mr. Douglas in which Mr. Douglas as the character Alessandro or rather as the character Alessandro was actually being portrayed by Mr. Douglas and in the foreground of these shots the character known as Dardo was not being performed by myself but by Mr. Turner.

Q. That is what I was interested in—in those sequences, where you get or, at least, in two of those sequences of this duel that is occurring there, where you get a face on picture of Alessandro and you get a backward shot [172] or a shot from the back of the character.

A. Over the shoulder?

Q. Over the shoulder of Dardo when this duel is going on there were at least two of those sequences of that duel in which Don Turner was playing the part of Dardo, isn't that correct?

A. That is correct, yes.

Q. Now, are you familiar with the affidavit that was signed by the stunt man out there with relation to this picture?

A. I am familiar with it to the extent I know it was going to be signed, yes.

Q. And you have seen it?

(Testimony of Burt Lancaster.)

A. I have seen it vaguely in lobby displays.

Q. And you are aware of the fact that among the things listed in the lobby display and in the affidavit as being the acts performed by you, were the sword duel with Robert Douglas?

A. Yes, yes.

Q. And in the list of deeds for lack of a better description outlined in the lobby displays and in the affidavit, falling in the category of things performed exclusively by you is the sword duel with Douglas? A. Well, I can only say——

Mr. Williams: That is objected to as including the contents of a written document which counsel has, because I furnished it to him and if it is to be referred to and its contents involved I think the document should be in evidence.

Mr. Dryden: That is satisfactory, your Honor. We will offer it in evidence, a photostatic copy of plaintiff's exhibit next in order.

The Court: Received.

The Clerk: Exhibit 9.

(The document referred to, and marked Plaintiff's Exhibit 9, was received in evidence.)

[See page 387.]

Q. (By Mr. Dryden): Now, I believe you stated in addition to the affidavit you referred to, you saw lists in the lobbys of theatres in which this picture was being shown? A. Yes.

Q. And among those deeds listed as being performed exclusively by you was the duel with Robert Douglas, isn't that correct?

(Testimony of Burt Lancaster.)

Mr. Williams: Just a moment. That is objected to as being a misstatement of the language of the affidavit.

Mr. Dryden: This is cross examination, your Honor, with reference to the displays that he refers to, that he saw in the lobbys.

The Court: The objection is overruled. [174]

Q. (By Mr. Dryden): Do you have the question in mind?

A. Would you mind repeating the question?

Q. In these displays that you observed in the lobby with relation to this picture, among them was listed as the deeds performed exclusively by you as the sword fight with Robert Douglas, isn't that correct? A. Yes, that is correct.

Mr. Dryden: I have no further questions.

Mr. Williams: I have no further questions.

The Court: That is all, Mr. Lancaster. Call your next witness.

Mr. Williams: Mr. Cavens.

ALBERT F. CAVENS

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Albert F. Cavens.

Direct Examination

Q. (By Mr. Williams): What is your occupation, Mr. Cavens?

(Testimony of Albert F. Cavens.)

A. Fencing instructor and motion picture choreographer of fencing.

Q. How long have you been engaged in that occupation?

A. Actually engaged since my return, since 1937.

Q. And are you the son of Mr. Cavens who has long [175] been known as a fencing instructor in the motion picture business?

A. I am the son of Fred Cavens, fencing master.

Q. Did you do some work in preparation for and in the picture The Flame and The Arrow?

A. Yes.

Q. What work did you do in preparation for that picture?

A. Mr. Lancaster studied fencing with my father for six months prior to the picture and I did the fencing choreography in the picture, instructing Mr. Lancaster and Don Turner the complete routines of the sequence.

Q. Were you yourself present in the dueling sequence between Dardo and the character Alessandro?

A. I doubled the character Alessandro throughout the entire sequence with Mr. Lancaster.

Q. And who portrayed the part of Dardo?

A. Mr. Lancaster.

Q. Did he portray the part of Dardo throughout the entire fencing sequence?

A. Throughout the entire fencing sequence with me.

Q. Now, were there in addition to his portrayal

(Testimony of Albert F. Cavens.)

of that character and his fencing, were there other pictures taken, portions of action in which the character Dardo was portrayed by Don Turner? [176]

A. Well, let me explain that. After you do what is termed a master shot, and a master shot is a shot that is done with the principal, Mr. Lancaster as Dardo, and the double, following that there is a return shot made of the other character. In other words, Mr. Lancaster opposite Alessandro in this sequence, Mr. Lancaster did the entire thing with Robert Douglas. However, for over the shoulder shots or what we call establishing shots, over the shoulder shots where merely the arm is shown at that time I believe there were two times that they used Don Turner.

Q. Yes. Now, what type of swords were used?

A. That was the same swords we used in the picture called Robin Hood with Errol Flynn. It is called a broadsword, a duralumin blade.

Q. And in the actual preparation for this duel is the entire action laid out and rehearsed in advance?

A. Yes. If I may explain it. In my profession we always—a musician may write his music but he has to have an instrument to play it upon. In my case where Mr. Lancaster is occupied in practice I have to have someone to work the choreography of the duel out with. It isn't something you may just imagine and put on paper. You have to have someone actually work it with and in this case that is the reason why Don Turner was hired at that

(Testimony of Albert F. Cavens.)

time, to aid me in working out the choreography of this duel. [177]

Q. And then having worked that out you taught it to the principals?

A. I taught it to both principals, Mr. Lancaster and Mr. Douglas.

Q. And thereafter it was filmed as you have described it?

A. Well, a picture is worth 10,000 words and it was much easier for Mr. Lancaster to see Mr. Turner portraying his part at that time in rehearsal than it is to explain it and that was the reason for Don Turner following that. The entire sequence was done by Mr. Lancaster and myself.

Q. Now, are you what is called a stunt man in the picture business?

A. Well, if I may say so, the stunt men may not consider me a stunt man but in my line of work I consider myself a stunt man and my work is stunts.

Q. And you have specialized in that particular line?

A. I specialize in motion picture fencing and also in the art of teaching modern fencing.

Mr. Williams: No further questions.

Cross Examination

Q. (By Mr. Dryden): As I understand it, you classify these implements that were being used as broadswords, is that correct?

A. Broadswords. [178]

(Testimony of Albert F. Cavens.)

Q. I had the impression from watching the film that when those are passed swiftly through the air they give off a sound. Is that purely a sound effect or is that a fact when you are waving them back and forth?

A. All the sound effects in that picture were done by myself.

Q. Now, in that sequence, if I am correct, there were several sequences where it would appear that a sword was rapidly put through the air and you would hear a whish?

A. That is true. That is done merely on sound film and not on the motion picture film. Those are inserted.

Q. And you say in these sequences that you had, as I understand it, you playing the part of Alessandro in the entire duel. Is that correct?

A. Correct.

Q. And by the same token on other occasions there would be a shot taken from the back of Dardo showing you and the expression on your face as you were using your broadsword, is that correct?

A. Would you repeat that last part again?

Q. There are other sequences showing over Dardo's shoulder at Alessandro? A. Yes.

Q. And that would show the expression and dueling that Alessandro was doing? [179]

A. Yes.

Q. And you do recall that in at least two of those shots, that were back shots of the character Dardo facing Alessandro, that Don Turner was the

(Testimony of Albert F. Cavens.)

one that was actually wielding the weapon at that time?

A. Well, as I explained before those are not important shots.

Q. Just a minute. I move to strike the answer.

The Court: Answer the question.

The Witness: Yes.

Mr. Dryden: I have no further questions.

Mr. Williams: May this witness be excused?

The Court: Yes. Call your next witness.

Mr. Williams: Billie Curtis.

BILLIE CURTIS

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Billie Curtis.

Direct Examination

Q. (By Mr. Williams): Your name is Billie Curtis? A. Yes, sir.

Q. And you are the person who portrays the part of small boys in motion pictures? [180]

A. That is right.

Q. And you are a midget?

A. Well, you can't—I don't think I am.

Q. What do they call you?

A. No, I am not in the midget class.

Q. What do they call you?

A. Just a little man. There is a difference.

Q. And you are at any rate over 21 years old?

(Testimony of Billie Curtis.)

A. Yes, sir.

Q. How tall are you, Billie?

A. I would say close to four feet two inches. That would be 50 inches.

Q. In the picture The Flame and The Arrow you portrayed in one or two sequences the character Rudie? A. That is right.

Q. And do you remember the sequence in which the character Dardo carries the character Rudie along the crest of a roof for a distance of 25 feet or so. Do you remember that sequence?

A. Yes, I do.

Q. And in that particular sequence do you portray the character Rudie? A. Yes, I did.

Q. Now, in the sequence which preceded that, in which the little boy Rudie was carried from the ground up to the [181] crest of the roof, do you portray that character?

A. At one time I went in there to try the stunt for the sake of the boy. In other words, you are referring to where he is shown in the crowd?

Q. Yes.

A. Mr. Lancaster drapes him over his shoulder and climbs up an incline and up to the roof, which is the actual roof and hides him behind the chimney.

Q. Yes.

A. I still did that with Mr. Burt Lancaster to try the stunt for the boy but they found I was too fat so they had the boy do it again.

Q. Now, when you came to doing that portion

(Testimony of Billie Curtis.)

of the picture where you were carried across the crest of the roof for this 25 feet or so, who carried you?

A. At that time I was being carried by Don Turner.

Q. That is in the picture? A. Yes.

Q. Did Burt Lancaster himself carry you along in that sequence?

A. At one time Burt Lancaster went along without the arrows being shot to see the safety of that for Don Turner. He doesn't remember it but I do recall that.

Q. He carried you, did he?

A. Yes, because it led—he went down the roof to [182] show me how to go from one roof to the other, to make it an easy climb and——

Q. Well, you yourself then at a later point in the picture did go along?

A. Both roofs.

Q. The crest of the roof and the down slope of the roof?

A. I went from one slope up to the other.

Q. Portraying the part of Rudie?

A. Yes, sir.

Q. So that actually in this picture, in this sequence in which the character Dardo and the character Rudie were escaping along the crest of the roof you were carred twice, once by Turner and once by Lancaster? A. That is right.

Mr. Williams: That is all.

(Testimony of Billie Curtis.)

Cross Examination

Q. (By Mr. Dryden): Mr. Curtis, you say in the sequence running along the top of the roof at the time at which Mr. Lancaster carried you, that was for checking with relation to the safety of the arrows that were being shot?

A. No, not the arrows. The arrows weren't being shot. That was done without arrows.

Q. That was done without arrows? [183]

A. Yes.

Q. Then in the actual sequence that you performed with Don Turner as he was carrying you across the roof arrows were being shot?

A. Arrows were being shot ahead of us with no danger to the players.

Q. Ahead of you to give the appearance of——

A. That they were being shot into the air, yes, because the angle of the camera would catch the arrows and would give the impression that they were close to the persons that they were being shot at.

The Court: You weren't scared of being shot then?

The Witness: No, sir, at no time. I wouldn't have done it if I had, believe me.

Q. (By Mr. Dryden): Incidentally, with relation to that sequence of running across the roof, did you receive stunt pay for that sequence?

A. Are you talking about when I ran across the roof by myself or with Mr. Turner?

Q. With Mr. Turner.

(Tesimony of Billie Curtis.)

A. Mr. Turner and I ran across—I don't have any stunt pay whatsoever in a picture. I would like to make that clear. If I do a boy and I walk along the sidewalk and trip, if I can get $500 I will take $500 but if I get only $50 I will be satisfied with $50. You can't classify me as a [184] stunt man for the simple reason that I am the only one to double for kids and the money I can make from the studios I get not as a stunt man. There are no stunts as far as I am concerned. I have to take my life in my own hands. If I trip or fall that is all there is to it. I am just a little man.

Q. That sequence after you crossed the roof when you ran down, apparently down to give the soldiers the idea, I believe, that Dardo was leaving you or you were trying to catch up with him. Dardo was shot and that sequence——

A. I consider that a stunt and if I could have got $1,000,000 I would have but it was just my fortune I didn't get it.

Q. You were there running then on that same roof where you ran down one side?

A. I ran down one slope and up the other slope, yes, sir.

Q. And was that the slope that was immediately adjoining the area where Turner had carried you?

A. Yes, sir. It lead to the other roof. That is not the same roof that we walked along, no.

Q. But it was immediately adjoining?

A. An adjoining roof, right, and we walked along there.

(Tesimony of Billie Curtis.)

Q. That was a platform, as I understand it, on the far side? [185]

A. It was a platform, I would say safe enough for well, let's say an elephant to walk that, that is the width, and every precaution was taken. On the other side we had a scaffold to protect us.

Q. Now, were you being carried over his back at that time? A. Yes, sir.

Q. Am I correct in my understanding, Mr. Curtis, in so far as the back side of the scaffold is concerned, below the scaffold was a straight drop to the ground?

A. It wasn't straight, no. The roof was—well, the back of it was the backing, yes.

Q. And what distance would you say the scaffold was from the ground?

Mr. Williams: Which scaffold are you talking about?

The Witness: Which scaffold are you talking about? The one to protect us?

Q. (By Mr. Dryden): The one that was——

A. The one to protect us was just low enough that it was out of the film, that the camera couldn't pick it up.

Q. How high was that?

A. Anywhere from 2½ to 3 feet.

Q. From the ground itself?

A. No, from the top of the roof.

Q. I want to know from the ground, how high up? [186]

A. That I couldn't tell you. There were cross

(Tesimony of Billie Curtis.)

pieces there, coming up supporting the scaffold, so I wouldn't know.

Mr. Dryden: I have no further questions, your Honor.

Mr. Williams: No further questions.

The Court: That is all.

(Witness excused.)

Mr. Williams: Mr. Thompson.

GLENN THOMPSON

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you please state your name?

The Witness: Glenn Thompson.

Q. (By Mr. Williams): Your name is Glenn Thompson? A. Yes, sir.

Q. What is your occupation, Mr. Thompson?

A. Stunt man.

Q. In the motion picture business?

A. Yes, sir.

Q. How long have you been in that business?

A. Since 1937.

Q. 1937. What character of stunts do you perform? [187] A. Just about everything.

Q. For the purpose of the court's information, will you give us first a brief statement as to the class of things you do.

(Testimony of Glenn Thompson.)

A. Oh, fights, drags, falls, car skids, wrecks, things on that order.

The Court: Speak up a little louder, please.

The Witness: Fights, wrecks, falls, transfers. That takes care of the majority of them.

Q. (By Mr. Williams): Now, directing your attention to the character of stunt that involves the transfer from one running to another running horse?

A. Well, that is called a bulldog.

Q. That is called a bulldog? A. Yes, sir.

Q. Do you do that character of stunt?

A. Yes, sir.

Q. Now, in riding, just straight riding over ordinary terrain, such as through a forest, or something like that, is that type of riding done by a stunt man, or is it done by extras?

Mr. Dryden: That is objected to on the ground it is immaterial, your Honor.

The Court: Do you contend that everybody that rides a horse is a stunt man, counsel? [188]

Mr. Dryden: No, but I contend it does not make any difference whether that work is generally done by a stunt man or not done by a stunt man. There are certainly some horse-riding activities that would constitute a stunt, and many others wouldn't.

The Court: Counsel, are you attempting to prove by this witness that the riding of a horse is not a stunt?

Mr. Williams: The riding of a horse through a

(Testimony of Glenn Thompson.)

forest at a fairly fast clip, with nothing else to it, is not a stunt in the motion picture business.

The Court: Well, this court has had experience before the days of automobiles.

Mr. Williams: If your Honor had about the same experience I had when I used to spend my summers on my grandfather's farm, I did a lot of riding that might have been called a stunt, but I never got any stunt money, and they never called me a stunt man.

The Court: They probably called you something else.

Mr. Williams: I am sure of that. That is the point I was trying to make with this witness, your Honor, as to whether straight riding either through a forest or over other terrain was considered stunt work. That is the question to which there is an objection.

The Court: I think what he calls it is not material, if there is an objection to it. [189]

Q. (By Mr. Williams): I will ask you whether in the motion picture industry the riding of horses through forests, and straight riding which does not involve falls, or the falling of the horse, or transferring from one horse to another, is classified as stunt work.

Mr. Dryden: To which we object, that it calls for a conclusion and opinion relative to the ultimate issues of the case.

The Court: Are you being paid in the riding of horses as a stunt man?

The Witness: I am always paid as a stunt man.

(Testimony of Glenn Thompson.)

The Court: You are always paid as a stunt man?

The Witness: I am always paid as a stunt man.

Mr. Williams: As a matter of fact, the riding of the horses was done by extras, not by a stunt man at all.

Mr. Dryden: Your Honor, I object to counsel continuing to testify in this case.

The Court: He had a lot of experience, counsel.

Mr. Dryden: I appreciate that. I move to strike the statement of Mr. Williams on the ground it is not testimony, and not part of the question.

The Court: That is not in issue. I don't care about it one way or the other.

Mr. Williams: I will consent it be stricken.

The Court: What was that? [190]

Mr. Williams: I will consent that may be stricken, if there is any objection by counsel. I am sure your Honor does not regard it as testimony.

The Court: I am not bothered by your testimony any, I will tell you that.

Mr. Williams: Now, may we have a ruling on the particular question?

The Court: I think the objection is good. Sustained.

Mr. Williams: I will offer to prove by this witness that in the motion picture industry the riding of a horse, either at a slow or fast gait, or over ploughed or rolling terrain, through hills or through mountains or through forests, when unaccompanied by falls, or bulldogging, or transferring from one

(Testimony of Glenn Thompson.)

horse to another, or by falling the horse, is not considered in the industry as a stunt.

The Court: You mean simply the riding of a horse?

Mr. Williams: Yes.

The Court: At a fast gait?

Mr. Williams: At a fast gait, yes.

The Court: I don't think it is what they call it in the moving picture industry. I think it is how the public would look at the word "stunt," and the other ruling still applies to this, counsel.

Mr. Williams: I just wanted to make the offer, your Honor. [191]

Q. (By Mr. Williams): Now, with reference to the picture, The Flame and The Arrow, did you work in that picture? A. Yes, sir.

Q. What work did you do?

A. I worked as a stunt man.

Q. What particular type of work?

A. I was mostly getting killed in the picture.

Q. In other words, you took a part in the fights, and falls; is that correct? A. Yes, sir.

Q. Did you portray the part of a soldier or an outlaw? A. Just a bit of everything.

Q. You were a soldier, and then when you got killed, out of that you got up and became an outlaw?

A. Yes, I turned around and killed myself.

Q. All right, sir. Did you see the filming of that portion of the picture where the character Dardo, portrayed by Don Turner, and the character Rudie,

(Testimony of Glenn Thompson.)

portrayed by Billie Curtis, went across the crest of a roof which stand, oh, 25 to 30 feet up?

A. Yes.

Q. While arrows were being shot?

A. Yes, I did.

Q. Do you have an opinion as to whether that particular [192] sequence that I have just described constitutes a stunt, as a stunt is known in the motion picture business?

Mr. Dryden: To which I object.

The Court: The objection is good on that and you can make your offer of proof.

Mr. Williams: I offer to prove by this witness, if your Honor please, that in the motion picture industry the action which I have just described is not classified as a stunt. It is classified as a photographic double.

Oh, one other question. May it be deemed that I have asked the same questions and made the same offer of proof with this witness with reference to the sequence where the character Dardo on a horse rides up and transfers to the standing cart at the time of the rescue of Papa Pietro? May it be stipulated I have asked the same questions and made the same offer of proof with reference to that?

Mr. Dryden: I have no objection. It is so stipulated.

Mr. Wililams: That is all, then, so far as I am concerned.

(Testimony of Glenn Thompson.)

Cross Examination

Q. (By Mr. Dryden): Mr. Thompson, on any of your riding sequences in this picture, did you portray or double for the character Dardo?

A. I didn't do any riding in the picture. [193]

Q. You didn't do any riding at all in this particular picture? A. No, I didn't.

Q. Were you present at the time when the shots were taken with relation to a group coming through the forest to rescue Papa Pietro?

A. No, I wasn't.

Q. Were you present in the courtroom at the time that the fight occurred with relation to Papa Pietro? A. Yes, I was.

Q. In that particular sequence, did you play the part of a soldier or the band that was coming to rescue Pietro?

A. I played the part of a soldier.

Q. Do you recall in that sequence who it was that you observed, as between Don Turner and Burt Lancaster, when they entered the yard there to rescue Papa Pietro?

A. I don't think there was either Burt Lancaster or Don Turner on a horse at the time.

Q. Do you recall the sequence when the character Dardo came into the court yard on horseback?

A. Yes, I recall that. Burt did that.

Q. Do you recall any of those sequences in there where Don Turner, prior to the rescue of Papa Pietro, was on horseback dressed as Dardo?

A. Only when he rode up to the gate. [194]

(Testimony of Glenn Thompson.)

Q. When he was dressed in Dardo's outfit; is that correct? A. Yes.

Q. Now, did you engage in any fighting with Dardo at all in that sequence in the square?

A. No, I didn't.

Q. Incidentally, did you see the dueling sequence of Alessandro and Dardo?

A. Partly. Mostly, I was sleeping during that.

Q. You saw a part of it? A. Yes.

Q. In those parts that you saw, did you observe the sequence wherein Don Turner was dressed as Dardo in a duel with Alessandro?

A. No, I didn't.

Q. Now, on those occasions when you have been riding horses, and you ride a horse through what purports to be a forest at what would appear to be a fast clip, do you receive stunt pay for that?

A. I don't get hired for that.

Q. You don't get hired for that type of work?

A. No, I don't.

Mr. Dryden: I believe that is all the questions I have.

Mr. Williams: Nothing further.

The Court: That is all. [195]

(Witness excused.)

The Court: Call your next witness.

Mr. Williams: Mr. Newhouse.

RAYNSFORD K. NEWHOUSE

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you please state your name?

The Witness: Raynsford W. Newhouse.

The Court: It seems you have a low voice, and you are going to have to speak up.

The Witness: All right, sir.

Q. (By Mr. Williams): Mr. Newhouse, you try to talk loud enough so that I can hear you, and then everybody else will be able to. What is your occupation? A. Carpenter foreman.

Q. By whom are you employed?

A. Warner Bros.

Q. How long have you been employed by Warner Bros. as a carpenter foreman?

A. Since December of 1946.

Q. And you work out at the Warner Bros. Studios at [196] Burbank? A. Yes, sir.

Q. Among the duties of carpenter-foreman, do you have the job of laying out or directing the erection of sets, and scaffolding, and such as that?

A. Yes, sir.

Q. Did you have anything to do with laying out and directing the erection of the set, or portions of the sets that were used in the picture, The Flame and The Arrow? A. Yes, sir.

Q. Now, do you have in mind the portion of the set there which shows the court yard, and a

(Testimony of Raynsford W. Newhouse.)

long sloping roof, and then it is cut off, and in back of that set of that sloping roof, there is nothing that is shown so far as the picture is concerned? Do you have that in mind?

A. You mean there is nothing that shows on the film?

Q. Nothing that shows on the film?

A. Yes, sir.

Q. Do you know what that is—what is that called? A. Dijon Street.

Q. And at the time of the filming of the picture, The Flame and The Arrow, was there a runway erected at the back side of the crest of this roof on Dijon Street? A. Yes, sir.

Q. And did you have charge of designing and the [197] erection of that runway?

A. I had charge of the building of it, yes, the erection of it.

Q. And will you describe the setup there as to the width and character of construction of the runway?

A. Well, at the top—at the ridge of the roof we built a scaffold or platform two feet wide, running the full length. That platform was three foot eight inches to three foot or three foot nine inches or something like that, right close to that measurement from another platform which was five foot wide right below it.

The Court: How far below it?

The Witness: Three foot eight below the two foot scaffold. That scaffold was three foot wider

(Testimony of Raynsford W. Newhouse.)

than the one above and that one had a hand rail 42 inches high.

Q. (By Mr. Williams): The hand rail stood 42 inches from the floor of the wider scaffold?

A. Yes.

Q. And what was below that?

A. About six feet below that was the top of the arch. This roof that they shot at, as you remember, had an arch below it. The street went under it. That arch was 16 feet deep and was also housed in over the top so that was another six feet lower and was at least four to five feet wider than the five foot scaffold. In other words, projected back that [198] far.

Q. Was that a flat platform?

A. Yes, sir.

Q. Now, do you have a drawing that you made of this particular construction there?

A. I have.

The Court: I don't think there is any dispute as to the construction behind the peak of this roof.

Mr. Williams: I did not hear your Honor's statement.

The Court: I don't think there has been any substantial dispute as to the runway beyond the peak of the roof. I think all witnesses so far have testified to it.

Mr. Dryden: Of course we have no way of knowing, so far as I am concerned. I would appreciate it if we could see that, your Honor, if you will bear with us.

(Testimony of Raynsford W. Newhouse.)

The Witness: I also have a regular blueprint of it here, of the buildings down there.

Mr. Williams: Counsel has stated to me he has no objection to this being offered in evidence. May I ask the witness one or two questions about it, your Honor?

The Court: Yes.

Q. (By Mr. Williams): This is a drawing which you prepared yourself?

A. I prepared it myself, yes, sir.

Q. May I write the word "bottom" at the bottom of [199] it so we know which way it stands?

A. Yes, sir.

Q. Now, this shows on the right-hand side a line which has been marked with a little shading. What does that represent?

A. That represents the roof.

Q. That represents the slope of the roof looking toward the camera? A. Right.

Q. And back of that it shows a platform two feet in width and then it shows another platform five feet in width and it shows a distance of three feet six inches up to a rail as shown there?

A. Yes.

Q. And then below that it shows the top of the roof as being four feet wider than the five foot platform? A. That is right.

Q. And this is all accurate as to dimensions?

A. It is as accurate as I can remember.

Mr. Williams: We offer this in evidence, if your Honor please.

(Testimony of Raynsford W. Newhouse.)

The Court: It will be admitted next in order.

The Clerk: Defendants' Exhibit A.

(The document referred to, and marked Defendants' Exhibit A, was received in evidence.)

[See page 390.]

Q. (By Mr. Williams): Now, that second platform, the one that had the rail on it, was that put up especially for this picture or was that a platform that was used for other purposes?

A. We had that for other purposes originally. Originally that was for another purpose. It was revamped from another picture and we used that as a protection to go up the four extra feet.

Q. And what was that second platform, the five-foot platform, normally used for?

A. It was used for lighting the set, the electricians, grips—anyone to get around on the back of the set.

Mr. Williams: That is all I have. No further questions.

Cross Examination

Q. (By Mr. Dryden): Now, as I gather from your testimony you had this platform right below the crest of the roof. You built a platform there for a person to be able to pass over it, is that correct? A. Yes, sir.

Q. And that was for the purposes of a safety precaution insofar as their ability to negotiate that area was concerned, isn't that correct?

A. It was put there to walk on.

Q. And from the standpoint of the fact that

(Testimony of Raynsford W. Newhouse.)

it would [201] be much easier to walk on that than it would be a situation where you had a peak roof, where somebody was going, isn't that correct?

A. Well, we didn't have a peak roof. All we had was a ridge.

Q. Now, this second platform you refer to, that is down about three feet below that and about five foot wide. You said it was used for other purposes, but likewise in this case it was used for a safety precaution, isn't that correct?

A. It was, yes.

Q. And then you say there was still another platform down below that, is that correct?

A. Down below that was the arch that went underneath that that was housed over as a platform below the five-foot platform, yes.

Q. And was it the purpose of that likewise an additional safety factor?

A. Well, you mean—I am not here to say whether it is a safety factor or not.

Q. Was it put there for the purpose of——

A. It was already there.

Q. Was there anything done with relation to changing its structure in any manner by reason of the fact that the upper part of the house was being used? A. No, sir. [202]

Mr. Dryden: That is all.

Mr. Williams: No further questions.

The Court: Call your next witness.

Mr. Williams: May this witness be excused, your Honor?

The Court: Yes.

Mr. Dryden: No objections.

Mr. Williams: Mr. Greenlaw.

CHARLES F. GREENLAW

called as a witness by the defendants, being first sworn, was examined and testified as follows:

Mr. Williams: Your Honor, one of the witnesses asked me, one who has already testified, if it is all right for them to be excused.

The Court: Any witness who has testified unless directed by the Court to do otherwise, may leave the courtroom.

The Clerk: Will you state your full name?

The Witness: Charles F. Greenlaw.

Direct Examination

Q. (By Mr. Williams): Mr. Greenlaw, what is your occupation?

A. I am assistant production manager at Warner Bros.

Q. And how long have you had that position?

A. For about 10 years.

Q. Prior to that you worked where? [203]

A. At Warner Bros. in the production department.

Q. In other words, you worked yourself up to assistant production manager?

A. Yes, you can say that.

Q. What is the function of the production department at Warner Bros.?

A. The production department in a motion picture studio is responsible for preparing and budg-

(Testimony of Charles F. Greenlaw.)

eting pictures and then for supplying and controlling all of the physical requirements for the making of those pictures.

Q. And you as assistant manager of the production department, you are in charge under your immediate chief, of all of the work in that department? A. That is true.

Q. Now, you have in mind the making of the picture The Flame and The Arrow?

A. I do.

Q. Which was filmed? A. I do.

Q. Did the production department of Warner Bros. supervise the making of The Flame and The Arrow?

A. Yes, to a great extent. That picture was a Norma Production and they had their own production man assigned to the picture. However, our production department co-operated with them and to a great extent controlled and [204] mainly assisted in supplying all the physical requirements that they needed for making the picture.

Q. Now in connection with the matter of the making of that picture, was it made by one unit or two units?

A. It was made mainly by one unit but there were days on which a second unit photographed parts of the picture.

Q. And do you remember the character of the work done by the second unit in that picture?

A. Yes, I do.

Q. What was it?

(Testimony of Charles F. Greenlaw.)

A. On one occasion a second unit went out to a location and photographed a band of riders riding through the forest, presumably in the direction of the town.

And there was one other occasion, I believe—yes, it was the melee in the square of the town. That was photographed on the second day by a second unit.

Q. Now, did that second unit consist of any of the principals in the picture?

A. No. As I recall none of the principals were present on either day.

Q. And were any stunt men included in that group making up the second unit?

A. Yes, on one occasion.

Q. When was that?

A. In the general fight in the square of the town [205] stunt men were used.

Q. Now, in the sequence where they were used riding into town were stunt men used in that sequence?

A. No. I believe all of those partaking in that sequence were riders who come under a different classification. They were not stunt men.

Q. In the motion picture industry do the stunt men come under the jurisdiction of the Screen Actors Guild? A. That is correct.

Q. And the riders come under the jurisdiction of the Screen Extras Guild?

A. That is correct.

Q. And it was the men from the Screen Extras

(Testimony of Charles F. Greenlaw.)

Guild that were doing the riding that you described was done by the second unit? A. Yes.

Mr. Williams: May I have just a minute, if it please the court. I have no further questions.

Mr. Dryden: No questions.

The Court: That is all.

Mr. Williams: If your Honor please, the only other witness that I have that I will produce in court is a witness who is flying here from New York. He is supposed to arrive late this afternoon. I telegraphed him as soon as I found out the case would be shorter than we anticipated and he should [206] be here before 10:00 o'clock in the morning.

The Court: What do you expect to prove by that witness?

Mr. Williams: I expect to prove by that witness—he is a man from the Warner News, Inc. I expect to prove by him that the script which was sent from Hollywood for use in the newsreel was changed and cut—the language was cut and changed under his direction at the newsreel office without consulting or getting any authorization from Warner Bros. Pictures, Inc. That is what I expect to prove by him.

The Court: Are you in position to dispute that, counsel?

Mr. Dryden: Well, I certainly wouldn't want to stipulate to that without cross examining the man, your Honor. I don't know what your Honor's thinking is along that line but if this witness—in

other words, I am not in position to stipulate that that is the fact.

The Court: You could stipulate that he would testify to that. That wouldn't be stipulating to the facts. You can stipulate if he were present he would so testify.

Mr. Dryden: Yes, on the basis of the presentation.

The Court: Warner Bros. themselves have so testified that as far as they were concerned they were not consulted and they are the main representatives of the company.

There can't be much dispute about the fact that the publicity was issued and supervised by employees of the different Warner organizations in their regular course of their [207] business.

Mr. Dryden: That is right.

The Court: If there had been a little more cooperation on a pretrial I think we could have eliminated a good deal of expense in this case—a man coming all the way from New York to testify to that and you are not in position to dispute it. It was probably like thousands of other pieces of literature or publicity that they talk about going through the mill. It has been turned out without any specific authorization or resolution by the board of directors and so forth.

Mr. Dryden: Yes, your Honor. I hope your Honor doesn't have the feeling that at least intentionally we have put anybody to any additional expense with relation to this case.

The Court: The only thing is, counsel, I haven't

had any co-operation in getting this case together. Mr. Williams has taken the attitude of standing pat and "You fellows prove it," which he had a right to do, but his client is being put to this expense. The man is on his way here. That should have been stipulated to, that he would testify to that or his deposition should have been taken.

But if he is going to be here in the morning we might as well hear him. We can give him a run for his money at least.

Mr. Williams: He would be terribly disappointed if he [208] didn't have the opportunity to appear here, I suppose.

There is one other matter I want to take up with counsel. I have a witness who, unfortunately, I am not—I don't feel justified in calling into court for the reason that her entire future in the motion picture industry might become involved.

She is the woman who acted as the script clerk on this picture. The script clerk is usually a woman who keeps minute track of everything that goes on in the making of a picture. She is prepared to testify but unfortunately I don't want to call her in and away from her job, because she is doing a job for a company that she hasn't worked for before and the whole company is working and if she were called away it would cost thousands of dollars and for that reason I was going to ask counsel if they would do one of two things, either if they are willing to stipulate what she would testify, as I will say she will, or whether they would

agree to meet with me this evening and take her deposition in my office.

Mr. Dryden: We can work that out, your Honor. We can work that out in the absence of the court here and either get a stipulation or take her deposition tonight.

Mr. Williams: She will be available to have her deposition taken tonight and with that, as far as I know at the present time, so far as I anticipate, those will be the [209] witnesses we will offer.

The Court: Are you going to have some rebuttal?

Mr. Dryden: The only possible rebuttal that we would have would be on the basis of a re-examination. It wouldn't be over 10 minutes at the most and I seriously doubt if we have that.

The Court: We will take a recess until 10:00 o'clock tomorrow.

(Whereupon, at 4:10 p.m. a recess was had until 10:00 a.m. Thursday, July 23, 1953.) [210]

Thursday, July 23, 1953, 10:00 a.m.

The Court: Proceed.

Mr. Williams: If your Honor please, in accordance with the suggestion which was made yesterday evening, counsel has agreed with me as to a stipulation with respect to the testimony of a witness named Metta Rebner. May I read the stipulation into the record?

The Court: Yes.

Mr. Williams: It is stipulated that Metta Rebner, if called and sworn as a witness, will testify that she is and for many years has been a script

clerk working in the production of motion pictures. That the duty of a script clerk is, among other things, to observe and make note of all action and details of action in the course of the production of a motion picture. That she worked as script clerk during the production of the motion picture The Flame and The Arrow during October, November and December of 1949. That she was present and observed the rehearsals, enactment, and photographing of the scene in which the character Dardo after having carried the character Rudie from the ground to the roof of the building, is shown in a distant shot against the skyline fleeing along the crest of the roof with Rudie over his shoulder while arrows were being shot at him. That this scene as enacted in the film was played by Don Turner [212] in the character of Dardo and the midget Billie Curtis as the character Rudie. That prior to the actual photographing of said sequence, it was rehearsed and enacted by Burt Lancaster in the character of Dardo carrying Billie Curtis in the character of Rudie. That subsequent to such rehearsal and during the absence of Burt Lancaster from the set, the actual photographing of the scene with Don Turner was done.

That the witness is now employed by an independent motion picture company and is engaged in working as script clerk on a motion picture which is now in production.

I understand that counsel agrees to that.

Mr. Dryden: Yes, so stipulated.

Mr. Williams: If your Honor please, the wit-

ness who was supposed to arrive from New York sometime through the night hasn't shown up yet. I presume he is en route by air some place.

The instructions I gave were that he was to be here in time to be in court at 10:00 o'clock this morning. He hasn't shown up and I am not in position to ask counsel as to what his testimony will be because it isn't certainly their fault that I haven't him here this morning.

Under the circumstances if he does show up before we conclude might I have permission to reopen for the purpose of taking his testimony; if he doesn't show up I won't delay the court by asking for a continuance. [213]

The Court: All right. You rest then with that reservation?

Mr. Williams: Yes.

Mr. Dryden: If the court please, at this time I would like to read into the record a few of the answers to the interrogatories, which, as I understand, is a procedure which must be followed in order to have it in evidence as such.

Mr. Williams: I have mine here, if you will give me just a minute. This is the answers to the interrogatories?

Mr. Dryden: Yes.

Mr. Williams: I have the answers to the interrogatories.

Mr. Dryden: All right. "Interrogatory No. 3:

"What is the name and address of the actor who appeared in the motion picture The Flame and The Arrow, who, as Dardo, ran along the edge of

the roof carrying another person depicted to be the boy, Rudie?

"Answer: Burt Lancaster.

"Interrogatory No. 10:

"Which are the scenes and what parts were performed by each of the said stunt men in the filming of the motion picture The Flame and The Arrow?"

Answer on pages 6 and 7, or, the answer at the top of [214] page 6, beginning with line 3:

"The sword fight between Dardo and Alessandro was prepared, set up, rehearsed, and, in part, photographed with Burt Lancaster, Robert Douglas, Don Turner and Albert Cavens. In this development of the scene, during the process of rehearsal and preparation, Don Turner frequently doubled Burt Lancaster, and Albert Cavens doubled Robert Douglas, and they sometimes appeared in these respective parts during the shooting of scenes, but in the final make-up of the picture the scenes which appear in the picture show Burt Lancaster himself and Robert Douglas himself staging the fight. Charles Horvath and Glenn Thompson were stunt guards in this scene."

Further answer to that same interrogatory, beginning at the top of page 7.

Mr. Williams: Just a moment. As to the answer to that interrogatory, you are cutting out part of it. I assume the entire answer is to go in.

Mr. Swartz: Your Honor, under Rule 33 answers to interrogatories may be used to the same extent as Rule 26(d), which provides where there

are interrogatories answered by a person, they may be used for any purpose, or any part thereof, as admissions. We can pick out the parts we want, and so [215] far as the other parts, they are self-serving declarations, and under the cases I have they are not admissible under our objection.

Mr. Williams: You can't take a part of an answer, without the rest of it, and call it an admission.

The Court: You can offer the rest of it.

Mr. Williams: The point is, I am going to offer the rest of the answer, whatever it is, and it might be read at the same time.

The Court: He does not want to be charged with the responsibility for it.

Mr. Williams: I beg pardon?

The Court: He does not want to be charged with it as his evidence.

Mr. Williams: Yes.

Mr. Dryden: Further answer on page 7:

"Escape after capture. Dardo and Rudie make getaway over roofs.

"This scene, the latter part of which shows the figure of Dardo carrying Rudie in profile along the top of the roof, was photographed at least twice. In one of the takes Don Turner doubled for Burt Lancaster in the part of Dardo, with Billie Curtis doubling for Rudie. In the other take of this scene Burt Lancaster himself performed the [216] role of Dardo, with Billie Curtis doubling for Rudie. In the other take of this scene Burt Lancaster himself performed the role of Dardo, with Billie

Curtis doubling for Rudie. The latter pictures (those which show Burt Lancaster himself) are the ones which were actually used in the picture."

I believe those were the answers to the interrogatories that we desire to read in evidence, your Honor.

Mr. Williams: May I take just one second to see if there is any additional part of this answer that I think is relevant?

Mr. Dryden: Oh, yes, there is one other page, your Honor, while he is doing that. Interrogatory No. 11:

"What are the names and latest known addresses of each stunt man who wore the costume of Dardo in the motion picture The Flame and The Arrow, and in which scenes did each perform."

That answer is on page 8:

"Our records show only one stunt man who wore the costume of Dardo * * * Don Turner.

"Scenes in which he performed:

"(a) Escape after capture over city rooftops. (In one take; not used in picture.)

"(b) 2nd Unit shot of Papa Pietro's [217] rescue.

"(c) Sword fight between Dardo and Alessandro (In rehearsals and shots not shown in picture)."

Mr. Williams: I have no additional part of that answer under 10 that I desire to offer, your Honor.

Mr. Dryden: With that, the plaintiff rests, your Honor.

Mr. Williams: I see the witness has just come

in. May I have a minute to speak with him, your Honor?

The Court: Yes.

(A short interruption.)

Mr. Williams: May I have permission at this time to reopen the case for the purpose of putting on the witness?

The Court: Yes.

WALTON C. AMENT

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: Please state your name.

The Witness: Walton C. Ament.

Direct Examination

Q. (By Mr. Williams): What is your occupation?

A. I am vice-president and general manager of Warner Pathe News. [218]

Q. And how long have you been occupied in that position?

A. Warner Bros. acquired the company in August of 1947, I have occupied that position since that time and for eight years before that.

Q. So that in 1950, the spring and summer of 1950, you occupied that position? A. I did.

Q. Now, what is the business of Warner Pathe News?

A. It is primarily engaged in the production of newsreel which is distributed weekly in the United States. It is also distributed once weekly

(Testimony of Walton C. Ament.)

in Canada and once weekly in South America in Spanish and Portuguese.

Q. How is the newsreel made? I mean how do you get the material for the newsreel?

A. We have our own offices and camera crews distributed, we hope, strategically around the United States and around the world for material from the various areas of the world.

We have exchange arrangements with Pathe News London, Pathe Journal Paris and other affiliates.

We send them our film. They send *is* their film. Frequently we act especially upon request of each other for particular coverage. That film comes into New York City, our headquarters, where it is screened. [219]

A determination is made as to what shall be included in the various editions of the newsreel and then the necessary mechanical processes to place it in film which can be distributed in theatres is done.

Q. Thereafter do you have a system of distribution of the pictures throughout the world or throughout the areas where you show these newsreels?

A. Yes. The newsreel prints are distributed by Warner Bros. Distributing Corporation.

Q. Now, in the case of a news picture which was taken in Los Angeles what would be the process that it would go through?

A. It would be shipped to New York City where

(Testimony of Walton C. Ament.)

it would be screened by our editorial board and it would be used or not used depending upon its relationship to the value of other material that is available for that particular edition of the newsreel.

The amount of it which would be used would depend on two things: One, its intrinsic value and, two, its value in relation to the other material that is available for that particular edition.

It is necessary many times to reduce the length of a given subject in order to get it into the particular edition of the newsreel—all of the material that you feel should be included in that particular issue. [220]

Q. Now, if a newsreel subject is photographed in Los Angeles and sent to New York as you have described, it then follows the course of eventually being made into a print which is sent to various places in the world, including Los Angeles, is that correct? A. That is correct.

Q. Now, with reference to the comment accompanying the pictures, who does that—makes the actual sound track which accompanies—which introduces pictures or comments on pictures which are shown in newsreels?

A. We have a staff of three writers who look at the picture after it has been finally cut. By cut I mean film cutting is more or less a word of art, I guess, in the motion picture business. The writer sees the picture at that time. The exact length of particular scenes in that picture or subject are then given to the writer. It is necessary for him

(Testimony of Walton C. Ament.)

to write the narration, the script for the narration which will accompany that picture in a fashion which will permit the arrator to be speaking of a given scene at the time that that scene is on the screen. It is a technique, a knack which has to be acquired by motion picture writers.

Q. In other words, the narration which accompanies the news item is written and spoken by individuals in the New York studio of Warner Pathe News? A. That is correct. [221]

Q. Incidentally, this Warner Pathe News is owned by a corporation known as Warner News, Inc.?

A. Warner News, Inc. is the corporate name.

Q. Now, do you remember the matter of the preparation of an item in the newsreel which came out in July 1950 involving the picture The Flame and The Arrow and the sequence of Burt Lancaster in a bank counting $1,000,000? A. I do.

Q. And you were in charge of the matter of editing and setting up of that particular item in the newsreel which resulted? A. I was.

Q. I show you now a document consisting of three typewritten pages headed with the wording: "Original script from studio" and ask you to examine this and state whether that is one of the copies of the script as you received it in New York from your representative in Hollywood?

A. That is a copy which accompanied the film as it was shipped to New York.

(Testimony of Walton C. Ament.)

Q. And that was sent to New York. Does it indicate who sent it to New York?

A. The cameraman, Vanderveer who was our cameraman here in this area.

Mr. Williams: May this, if your Honor please, which has been examined by the witness, the original script from [222] the studio, be marked in evidence as the defendants' next exhibit?

The Court: Hasn't it already been admitted?

Mr. Williams: No, this is a different copy than that which has already been entered.

The Court: Is it an exact copy?

Mr. Williams: Well, it has some language in it that is different and for that reason I think it should be in.

The Court: What is the materiality of that?

Mr. Williams: Well, it just happens, as will be developed, that this newsreel as it went out, went out in two different forms—one for national release and one for release to Los Angeles and this particular document which I am speaking of appears to be broken up into two parts, and apparently part of it was used for national release and the other part for Los Angeles release.

The Court: I would like to know what the materiality of it is. The one released in Los Angeles is the one the plaintiff is relying on.

Mr. Williams: That is the one which appears on pages 2 and 3 of this exhibit?

The Witness: (No answer.)

(Testimony of Walton C. Ament.)

Q. (By Mr. Williams): I mean that is the full script?

A. That is the full script of the material as it came in. [223]

The Court: What difference would it make whether they displayed that in New York or not?

Mr. Williams: I don't think that is material to this particular case.

The Court: Then why worry about it?

Mr. Williams: Because I think the full facts should be known.

The Court: I don't care what they displayed in New York.

Mr. Williams: Now, may I have this thing marked for identification?

The Court: Yes.

The Clerk: Defendants' Exhibit B for identification.

[See page 391.]

Q. (By Mr. Williams): Now, I show you a——

The Court: Unless counsel wants it in.

Mr. Dryden: No, your Honor. It was given to me but I didn't have a chance to look it over in detail.

Mr. Williams: I am going to refrain from referring to the national release and confine myself just to the Los Angeles release because I agree with your Honor it is not important.

The Court: The only thing is the national release might corroborate the Los Angeles release.

Q. (By Mr. Williams): I will now show you a document which is headed by the words in ink

(Testimony of Walton C. Ament.)

"used in toto" and ask you whether you recognize that document? [224]

A. This is a copy of the narration which accompanied the version distributed in Los Angeles and contains the credits which appear on the title which precedes the subject as it unrolls on the screen. The cameraman is Vandeveer and the voice is Andre Baruch.

Q. Now, I observe from this document concerning which you have just been testifying, that the language is different and less in words than the language of the document which has been identified as Exhibit B for identification—that is the language in the introduction, is that correct?

A. Yes, there is a difference.

Q. In other words, the language of the script as you received it from Los Angeles, the introductory language is as follows:

"The producers of The Flame and The Arrow offer a reward of $1,000,000 to anyone who can prove that Burt Lancaster did not himself perform all the stunts attested to by the stunt man who worked in the picture."

That is correct, is it not?

A. Yes.

Q. The language which actually appeared in the newsreel and was spoken in the newsreel is as follows:

"In Hollywood Burt Lancaster counts the $1,000,000 reward offered by Warner Bros. to anyone [225] who can prove that Burt himself did not

(Testimony of Walton C. Ament.)

perform his daring stunts in The Flame and The Arrow"?

A. That is correct.

Q. Now, who was it that determined that the different language should be used, as indicated by these two documents?

A. I cannot fix such determination to a particular individual. I can explain why it is necessary to revise suggested narration at the time such narration is actually produced for the given newsreel subject, but who at that time did that, I do not know. It is my responsibility.

Q. Well, let me ask you this: Was it done by a person employed by Warner News, Inc.?

A. It was.

Q. And what type of person or what type of job would do that?

A. It would have been one of our editors in conjunction with the man who wrote the script. Such personnel would find it absolutely necessary to alter narration, if that narration did not——

Mr. Dryden: Just a minute.

The Court: I don't think this means very much. Let him go.

Mr. Dryden: All right.

The Witness: (Continuing) ——if the narration as news did not fit the picture. [226]

Q. (By Mr. Williams): Let me ask you this: Was any person in Warner Bros. Pictures, Inc. consulted or advised with reference to the change in the language of that narration?

(Testimony of Walton C. Ament.)

A. No, sir.

Mr. Williams: We offer the second document concerning which the witness has testified, the one headed, "Used in toto in L. A." as the exhibit next in order.

The Court: It may be admitted.

The Clerk: Exhibit C.

(The document referred to was marked Defendants' Exhibit C, and was received in evidence.)

[See page 393.]

Mr. Williams: I have no further questions, your Honor.

Mr. Swartz: May I have Defendants' Exhibit B, for identification?

The Clerk: Here it is. (Handing document to counsel.)

Cross Examination

Q. (By Mr. Dryden): This particular reference to the Flame and The Arrow was studio publicity for Warner Bros.; isn't that right? A. Yes.

Mr. Dryden: That is all.

The Court: That is all. [227]

Mr. Williams: Just a moment. I want to ask another question.

Redirect Examination

Q. (By Mr. Williams): The Warner News, Inc. is not a part of the publicity department of Warner Bros. Pictures, Inc., is it?

A. No. The expression "Studio Publicity" is an

(Testimony of Walton C. Ament.)

all-embracing one, which I take to mean covering all pictures which are produced by the Warner Studio. It is customary to include in our newsreel, as it is customary to include in all of the newsreels, subjects relating to the feature pictures which are produced by their associated feature company.

Q. It was in that connection that this particular subject was placed in this newsreel?

A. That is correct.

The Court: That is all.

(Witness excused.)

Mr. Williams: I have nothing further, your Honor.

Mr. Dryden: The plaintiff rests, your Honor.

The Court: I am ready to hear any argument.

Counsel, I might say, for the benefit of counsel, that I think this question of authority as to charging Warner Bros. with this is a very complicated picture. [228]

I think I am more concerned now at this feature as to whether or not the stunts, referring to the word "stunts" as used in here, were performed by Burt Lancaster, and I might say to start out you will have an uphill job, because I don't feel that the things that you claim, where a double was used, come in the category of stunts.

Mr. Dryden: Now, if the court please, I appreciate your observations there in that respect, but we do have decisions which we feel are conclusive on the first point that you refer to, with relation to these interlocking corporations using each other.

The Court: I want to say as to interlocking corporations, I think it is certainly not to the credit of a great motion picture concern to come into court and put out that publicity, and then, when it comes to a showdown, they have to come into court and claim they are not bound by it. I think it is misleading the public, and I think it is unfair advertising, as far as that is concerned. I don't think it is a credit to any corporation, notwithstanding the legal effect it may have. But I think that as long as this court room was wanted to be used for a publicity stunt to advertise their different methods, why, the court might just as well be frank about it and say that I feel, very frankly, that this court has been used as a publicity stunt to publicize Burt Lancaster and this picture that is three years old, [229] and when it started, it had that effect, because this case, so far as that is concerned, could ultimately have been taken care of without the time of the court and without the expense involved, or for a lot less than either side has spent.

Mr. Dryden: Then, according to your Honor's suggestion, I am going to confine my remarks, and I am going to assume, for the purpose of my argument, that this was a legitimate offer and was played to the public by this subsidiary.

The Court: I am not making any such ruling at this time.

Mr. Dryden: I appreciate that, your Honor.

The Court: But I have been giving this question of the evidence here a great deal of thought, and I might say I thought that the plaintiff had more

definite evidence than has been introduced here. The only definite evidence, so far as stunts is concerned, is running across that roof. There are trick pictures here, that is true, but, as said in the advertising, I think it was "daring stunts,"——

Mr. Williams: Yes, that is the language, your Honor.

The Court: There is nothing daring about running across that roof. There is nothing daring in participating in that fencing, the way is was conducted.

Mr. Dryden: Now, in that respect, your Honor, that is one thing I particularly want to direct your attention to. In other words, you will recall in this situation here that [230] this was an offer made to the public.

The Court: I might say this, that I think that the advertising is misleading. I don't know whether it was an offer or not, but it certainly gave the public the impression it was an offer.

Mr. Dryden: And, in so far as that situation is concerned, of course, when they gave that impression to the public by a reading of that transcript that was given to the public, certainly, any person reading it would feel that it was in the nature of an offer made to them if they could comply with the conditions.

The Court: The only thing is if a newspaper publishes an article that a certain party had offered a reward, that does not prove a reward had been offered.

Mr. Dryden: That is true, your Honor.

The Court: As a matter of fact, if Burt Lancaster said that an offer had been made by Warner Broes., it does not prove an offer had been made.

Mr. Dryden: You recall in that relationship——

The Court: Let's not dwell on that here, because I want to say, frankly, I don't think you have established the stunts in the usual and ordinary acceptance of the meaning of that word as proved in this case.

Mr. Dryden: Your Honor, in that respect, as you can well imagine, I have reviewed this thing myself very carefully. [231] The criterion your Honor has held is with relation to the conditions as they appear to the purchasing public who go into the theatre, and who see the picture in reliance on the representations made to them.

The Court: Let's get the exact words in that newsreel.

Mr. Dryden: That is Exhibit 6.

(The document was handed to counsel.)

Mr. Dryden: It says, "In Hollywood Burt Lancaster counts the $1,000,000 reward offered by Warner Bros. to anyone who can prove that Burt Lancaster himself didn't perform his daring stunts in The Flame and The Arrow."

Now, in that respect, your Honor will recall that in Exhibit 9, which has been introduced, and in the original transcript, which was arranged out here directly by the publicity department through Mr. Evelove, there were representations made——

The Court: I know, but let's confine ourselves. Wherein do you claim there was a stunt? I have

given this a good deal of thought, because we have been living with it for three years, first with Mr. Marcus, and I have been after him a long time, and Mr. Williams has always put off the evil day of trying this case as long as he could, and he finally was tied down to a day certain, which he found he had to keep, because he didn't have any more alibis, and I want to say, frankly, I thought there was more to this case than appears on the surface. [232] I don't see that there were any daring stunts that were not performed by Burt Lancaster.

Mr. Dryden: Your Honor, let's take a look at this situation in this Exhibit No. 9, which is the thing that was attested to by the so-called stunt men, which is in evidence here, and as contemplating these daring stunts, particularly, was this sword duel with Robert Douglas.

The Court: You don't call that a daring stunt, do you?

Mr. Dryden: Certainly. Ten stunt men attested to it, and, certainly, it is a daring stunt, and looking at it in the film, where two men are engaged in an encounter of that nature.

The Court: But that is trick photography.

Mr. Dryden: Well, if the court please, after all a stunt, as defined by the only criterion I can look to, which in Webster's dictionary, which is a feat of skill and strength, or the like, one done to attract attention.

Now, certainly engaging in a duel of that nature that was shown to your Honor here in this film, where these two men were fighting with these broad

swords viciously is certainly one to attract attention.

As your Honor will recall, No. 1, in Exhibit 9 these stunt men have certified that those stunts that they attest to are the same stunts that are referred to here in the publicity, and among them was the duel with Robert Douglas. [233]

In addition to that, you will recall that the fencing master, who was here yesterday, testified that in so far as he was concerned, as you recall that situation, irrespective of what stunt men may have considered, he considered dueling of that kind, in so far as he was concerned, a stunt.

I appreciate that that statement is not binding upon your Honor, but when a fencing master says that, and there are ten of the stunt men on the scene attest to the fact, that means something.

As your Honor will recall, that particular affidavit states:

"The undersigned affiants, being duly sworn, depose and state:

"* * *

"That the affiants are all recognized Hollywood stunt men employed in the production of motion pictures.

"That the affiants realize that the public believes that stunt men and not the stars execute the stunts seen in motion picture.

"But, that the affiants were present at Warner Bros. Studio on the set of The Flame and The Arrow at all times during the production of the Technicolor picture when Burt Lancaster person-

ally performed the following stunts, which, in the affiants' opinion [234] have never been performed before by any star in any one picture."

Then they listed in that group:

"Various and sundry riding and action stunts in battle scenes and combat encounters, as well as hand-to-hand fight and sword duel with Robert Douglas."

Now, there was only one sword duel with Robert Douglas in this situation, and that is the sword duel your Honor will remember involved the character Alessandro, and I can't imagine any more persuasive evidence to a layman as to what would constitute a stunt than a statement to the effect that these stunts had never been performed before by any movie star, as such, and that listed in that group by direct attention is the duel with Robert Douglas.

And the record is cold on that proposition that insofar as part of that sequence, and I would ask your Honor to bear in mind, if you would, there is no representation—the representation here is as follows:

"Burt Lancaster did all the stunts that were portrayed to the character Dardo."

There is no equivocation.

The Court: All the "daring stunts."

Mr. Dryden: Yes, as are outlined here in this series.

The Court: I know, but, counsel, this duel, the way they described it yesterday it doesn't present any stunt. [235]

Mr. Dryden: Of course, your Honor, I suppose we can describe any sequence insofar as these stunt men are concerned or people working in the studio to the effect that no matter what you do you are not going to get killed.

The Court: I realize they are not killing each other but when they worked out that sequence of the swords clashing by having it all made out like they would a dance, as one of the witnesses said, the steps and so forth that they take, I don't see where there is anything daring about that.

Mr. Dryden: Well, of course, your Honor, we must use this criterion. After all we are dealing with the public and I would ask you this. If you or myself would go in and see this film with relation to the action in that picture and observe that duel taken together with the publicity in this case, referring to the duel with Robert Douglas, if we as laymen are the ones to whom this invitation was extended we would consider that to be a stunt and that is a feat calling for skill and strength and I submit, your Honor, that I firmly believe that any person who will go in and observe that duel, which was specifically referred to in these affidavits, would consider that to be a feat of skill and strength.

There is no doubt about it, your Honor, that that was a good portrayal of a vicious fight where these swords were coming in close proximity to a person at all times who was [236] purported to be the star in this picture. And we know from the record in these cases it was represented to the public that the stunts he refers to he did himself—not the most

of them but he did them all and did them by himself and we know from the record in this case that in this sword fighting sequence, which has been recognized by every stunt man on the scene as a stunt which was referred to, that in there Don Turner, in some of those sequences, admitted to by both Burt Lancaster and Don Turner that it was Turner who was in that scene at the time that sword fighting was going on, particularly in those sequences where they were facing Alessandro and that is the dangerous time, where the man on the other side is fighting back, but it shows the action of the one who is using the sword.

Now, if we want to take, for example, we can take these situations, so far as going back of the sequence and have a man—we will say the public goes in and sees a man walking across a high sequence and we will say that was Don Turner. Well, it develops that there is a net three feet under him and on the reasoning of going back of the studio's scenes and trying to ascertain and determine what happened you say: "Well, there is no stunt involved there," but as far as the paying public is concerned that goes in and takes a look at that, they are entitled to believe that in those things that are represented as stunts to them, such [237] as this duel, that they are looking at all times at the persons represented to be doing those stunts.

I would say that insofar as stunts are concerned in the eyes of the industry, where they take these precautionary measures, probably according to the interpretation that we go behind the scene, your

Honor might very well figure that there is no such thing as a stunt in that all these precautions are taken and it is all laid out in front to make a minimum amount of hazard.

But I submit, your Honor, that isn't the test here. Here is represented a stunt. Here is what appeared on the film to the buying public as a stunt and here was a stunt in which Burt Lancaster didn't perform.

The Court: Counsel, you are going to have to get something stronger than running across a boardwalk as a stunt.

Mr. Dryden: Well, I am directing my attention to the duel. Now, insofar as the boardwalk is concerned, I would ask the court to remember this. You were kind enough to express yourself so that I would be prepared to discuss that aspect of the situation.

No. 1, I think that as laymen we would feel in seeing a sequence that if a man was actually running across a peak roof with a young boy over his shoulder, that that would require some skill and some strength insofar as a stunt is concerned. [238]

Now, in this particular sequence it does develop again, as we go behind the props, that we find that there are some 2x12s out there to minimize the so-called danger. But you will likewise remember that certainly there must have been some hazard or something requiring skill in that operation or strength, by reason of the number of safety precautions that were used back of the prop in case

that anything happened even to the person that was going by on that 2 x 12.

Furthermore, your Honor will recall that in the original——

The Court: Who hasn't found trouble walking a 2 x 12?

Mr. Dryden: I can't claim immunity in that respect at all.

But your Honor will definitely recall in this situation that in the interrogatories that were answered by Warner Bros. Studio on this proposition, under oath, it was represented that Burt Lancaster was the person who performed that act of running across the top of this roof. Now, under the record in this case we know it was not Burt Lancaster who went across that roof with the boy on his shoulder but it was Don Turner and again using the test of the layman as such, and I say this, your Honor, I might make this interjection, as I understand the applicable rules here they would apply just the same as though the reward was $10 or $10,000,000. Either way there is a reward due or there isn't a reward due. And the fact that the amount, relatively speaking, is [239] astronomical, at least for lack of a better description it hasn't anything to do with the legal principles involved.

The Court: I realize that.

Mr. Dryden: All right. Now, this publicity is extended to the average citizen who is going to see that film with relation to this running across the roof sequence at the time John Doe, the public, goes in there and in view of this publicity that

Burt Lancaster had done all of the stunts, they see a man apparently run across a roof top. It makes no difference if he was running on a place that was only six inches off the ground because in my opinion that portrays to the public, that particular sequence, an act being performed by the leading man who is the star in this picture.

You recall that one of the ideas behind this whole thing as discussed by Mr. Evelove, was that this was the first person since the days of Douglas Fairbanks whom he felt they could represent was capable of doing the various running and jumping deeds set forth in there.

Now, I am fully cognizant and likewise apprehensive of what your Honor has heretofore said about running across that roof, but nevertheless insofar as the public is concerned in making that observation, and in view of these representations and publicity they were entitled to interpret that in the light that it was portrayed to them on the screen. And interpreting it as such they were entitled to rely upon the [240] advertising and the claim that that was being performed by the leading man, Burt Lancaster.

And when we get down to the question of stunts —I don't see, your Honor, with relation particularly to getting back to this dueling sequence, and I would like to have your Honor take a look at that Exhibit No. 9, with relation to the representations prepared by the studio, as to the caliber of men who were attesting that that dueling sequence was one of a series of stunts referred to therein.

It doesn't make any difference how many gyrations they set out on the floor in the prop room or how many precautions were taken in advance, if it is a thing that is held out to the public to be a stunt, and there can be no doubt——

The Court: We are not dealing here with trick photography. Now, running across that roof is simply trick photography as far as that is concerned. It might be misleading in itself. It might have looked to the viewing public that they were running across that roof but as a matter of fact it was simply trick photograph which was misleading as far as the public is concerned, but from a visual point of view it has the same effect as if they were doing it.

Mr. Dryden: That is right. Of course when you get to drawing the line between what constitutes a stunt and trick photography we can take any one of these acts that was performed by Burt Lancaster to some extent constituted trick [241] photography. Certainly I don't think the defendants even would say that everything was done here by trick photography and were not stunts. For example, with relation to the situation of the man carrying the pole on his head. It was quite apparent and I think the evidence discloses it, that from the angle—the wide angle lens that was used that there was trick photography to make the pole look twice as long as it actually was. And also the same situation at the top of the castle. It is true he was doing tricks and that there was trick photography in that. It appeared to be away up on the side of the building when in truth and in fact it wasn't, but he was doing those stunts.

Now, you can't let the studio take the position here that actually what we meant was that anything that had anything to do with trick photography wouldn't come within the scope of the things that we have outlined here for you as we represent to be stunts.

There is no trick photography involved in a duel. Not to go out of the record, your Honor, but we might very well say that that sequence where Papa Pietro got caught by his foot and was pulled up was trick photography. The fact of the matter is a man got his neck broken in that sequence. But anything connected with the moving picture industry may have an aspect of trick photography, but certainly there is no place where the defendant can take a position here and [242] say, "Well, no, this was trick photography, this wasn't a stunt."

One of the most thrilling sequences and one of the things that would lead the public to think that the man had skill and strength of the highest caliber was this duel to death with Alessandro.

Now, with relation to the other sequences in there, particularly in view—I want to pin-point your Honor's attention specifically to first the fact that it was represented that this duel was a stunt and there is no doubt about the fact, at least in my mind as a layman, to observe that duel on the screen indicated to me, even here in court, as much as I worked on this case, that that certainly was a feat that required skill and strength.

Now, is you want to go, as I say, behind the sequence and see the various precautions, and those

are never disclosed to the public when they are having these feats of skill and strength.

I recall the evidence as being that whenever this stunt man was in the picture that you saw only his back. It seems that they transferred Lancaster and the stunt man back and forth so that one time we were getting the picture of one man and at another time the picture of the other.

Mr. Dryden: Yes, but you see that question was formed in this way and the record is cold on this, your Honor, with [243] relation particularly to Don Turner's testimony, which is verified by both Lancaster and the other fencing master. In those sequences in which the camera was over Alessandro's back facing Dardo, those dueling sequences were performed by Burt Lancaster. And of course all the time this is going on there is a real sword fight taking place there—at least insofar as the screen is concerned. It appeared to me to be and those sequences, or at least part of those sequences, when they reversed it around and showed Alessandro doing his best to stab or kill Dardo, at least part of those sequences it is admitted that the other man engaged in that duel, where the picture was being taken from behind, facing Alessandro, were in fact Don Turner. And as a matter of fact that is the most difficult aspect of this situation insofar as the duel is concerned in that particular sequence the adversary who was getting a face-on shot is the one making the thrust.

Now, those questions were framed with relation to Mr. Lancaster, relative to those sequences and

were particularly limited in scope to those sequences and on cross examination he told us that at least two of those sequences which were shot facing Alessandro, Don Turner was in fact the man that was the opposing duelist.

In the original situation Don Turner stated on direct examination that in all of the sequences in which he was [244] facing Alessandro he was the duelist. On cross examination he said in the entire sequence he probably doubled for Burt Lancaster in that dueling sequence—I think he said five or 10—it may have been five—at least five per cent of the time it was he. It doesn't make any difference whether it was five per cent or 50 per cent of the time. The idea was still portrayed to the public that that was Burt Lancaster in that duel being subjected as a leading man to the hazards that were portrayed to the public.

My co-counsel has some suggestion. May I have just a moment?

There is one principle here with relation, particularly to the interpretation of these questions of offers of reward, your Honor.

The Court: May I have Exhibit 9?

(Document handed to the court.)

The Court: I want the one which contains the transcript of the new item.

The Clerk: That is Exhibit 6.

(Document handed to the court.)

Mr. Dryden: The principle particularly we refer to, your Honor, is referred to in American Juris-

prudence under Section 21 relating to awards in which it says that:

"An offerer may prescribe any terms he may wish but since experience has shown that many persons [245] are profuse in their promises and slow in meeting them, they are inclined to take advantage of mere technicalities in order to avoid carrying out their end of the agreement. Courts have often held that substantial compliance with the terms is sufficient."

Now, I am directing your Honor's attention particularly to the question of the technicalities that are involved here as they relate to going back and eliminating from the defendants' standpoint the stunt aspects of this thing by showing in the confines of the studio they used certain precautionary measures.

This offer was not made with a full disclosure that in any of these sequences and in this particular duel a fencing master lined it out like they were about to do a dance. This was portrayed to the public as a dueling contest specifically referred to as a stunt that was performed in its entirety by Burt Lancaster, the idea being to convey to the public that here is a leading man that subjects himself to all of the hazards throughout all of the sequences to any possible dangers incident thereto.

And certainly to look at that thing this was a feat of skill and strength and *is* you can believe what you are observing there, the slightest mishap could have ended in injury to somebody and probably

even more so if they had [246] forgotten their dance steps, as your Honor has described it.

Now, as I say, the reason that I particularly stress this dueling contest is by the very nature of the affidavits prepared by the defendants themselves to which they procured the signatures of 10 stunt men who have themselves classified that duel as a stunt.

The Court: Counsel, you are not altogether consistent in that statement because you objected yesterday when their witnesses attempted to describe what a stunt was. I held that a stunt should be such as defined in a dictionary and not what the men in the industry called a stunt.

Mr. Dryden: That is right. And I say the opinions of stunt men as determining the ultimate issue in this case are not admissible and your Honor so held. It is what the layman considers to be a stunt and you wouldn't except to find in a layman the niceties, the technical niceties or definitions that would come from a man in the industry.

This exhibit was introduced into evidence by me without objection at the request of Mr. Williams and among those things even stunt men—I am not saying that is conclusive, but I am saying to a layman let us take this situation, your Honor. You or myself are called upon to classify a particular sequence as a stunt. Certainly it would be persuasive to us in determining what a layman should anticipate a stunt would be by what 10 leading members would be willing to swear [247] to under

oath was one in a series of sequences that constituted stunts.

The test, of course, is what the layman thinks. But certainly that is persuasive with relation if they think it is a stunt then a layman 10 times more is entitled to feel it is a stunt.

Now, insofar as I am concerned, in view of that evidence and in view of what was portrayed to the public here, irrespective of what was done that was out and out stunt it is admitted by the testimony here of all parties, not just a conflict, Don Turner, Burt Lancaster and the fencing master that at least in some of those sequences they were performed by Turner as a double for Burt Lancaster.

Now, insofar as this roof sequence is concerned, I appreciate what your Honor's feeling on that is. Here is another factor that I think would be persuasive insofar as the public is concerned. You recall here that it was necessary—let us go back a little bit. You remember when your Honor was talking the other day about the sequence of throwing the boy over Lancaster's shoulder and then running up a 45-degree angle, you said that might be a stunt but that the sequence of running across the roof is not a stunt because they had 2 x 12 planks under the edge of the roof.

They used the young eight or nine year old boy. They used him, No. 1, because Billie Curtis was getting a little [248] bit heavy, as he described it, and, No. 2, obviously they used the youngster

because they felt no hazard was involved, but every sequence performed on that roof top, Billie Curtis —I don't like to call him a midget because I know he isn't but "little man" as he called himself. Billie Curtis was used in each one of those sequences in crossing the top of that roof and again in that sequence it was portrayed to the public, the people who were paying the money, the very people to whom this offer was made, that an actual performance was being given and that is the criterion.

Let us be realistic for one minute without reference to going back of the props. Of what value in the show business and what would be the audience reaction if when they came in on that scene where Dardo was going to escape with his son, they took a back shot and showed that he had 2 x 12's there that he was running along at the time they were shooting these arrows at him and by the same token at the time of this duel to see what went on before he went downstairs to his loved one. If they took a prop shot there showing the fencing master lining out each and every one of his steps what would the audience think?

Those are things that are done in studios but the representations to the seeing public are entirely contrary.

The Court: Well, I look at it differently than you do, counsel. I think when they say "daring stunts," that is all [249] we are concerned with and not trick photography.

I will agree with you that I feel that this trick

photography and so forth may be misleading so far as the public is concerned, but they apparently like it.

Mr. Dryden: May I inquire of your Honor one question that might help me in concluding my argument.

Were there any sequences in this picture that your Honor felt fell into the category of "daring stunts"?

The Court: Certainly, I do. I think those acrobatic stunts were daring stunts.

Mr. Dryden: Well now, insofar as the acrobatic stunts were concerned, as between the acrobatic stunts and the dueling contest, I can see no particular distinction, your Honor. Both of them required skill and strength and the fact that wherever they may have been done that is the test of a layman. It isn't a question of trick photography. There was no trick photography in this duel as such. It is true that the course was laid out for them but that was an actual photograph of a duel that was occurring. The same as an actual photograph of the acrobatics.

The Court: I know, but the acrobatic stunts were actually performed. I think he said he practiced them for a long time before the shots were taken.

I look upon those as the stunts referred to in this ad.

Mr. Dryden: Well, of course, they listed, if your Honor [250] will take a look at Exhibit No. 9

there, they listed the acrobatic stunts, the same identical stunts that your Honor refers to and they listed the dueling contest with Douglas.

The Court: That is where you are not consistent, counsel. [251]

I have held right through in this case that what these stunt men call stunts are not necessarily stunts, and you want to use the language in the industry on one side, but when it comes to your side, you want me to apply the other definition.

Mr. Dryden: No, your Honor.

The Court: I have said once before that you have been inconsistent in that respect.

Mr. Dryden: I don't intend to be inconsistent, your Honor, because no matter what terminology they use, it is going to be the one that you use, in the last analysis, as to what does or does not constitute a stunt. But I am using that by way of illustration, particularly, as it relates to the public, that the acrobatic stunts would fall in the identical category of the dueling stunts.

Now, the duel was performed, and there was no trick photography there. The duel was performed and there were no spots where there was any trickery at all, other than Burt Lancaster was not used in the sequence where he was facing Alessandro. But so far as trick photography is concerned, there was none in the dueling sequence.

I think I have pointed out in this case the factors I rely upon, and I am well aware that the power of repetition carries no weight in this court, and,

certainly, I am not going to repeat myself in that respect. [252]

The Court: My experience with the bar has been that they indicate that sometimes repetition does count.

Mr. Dryden: That may be so. But, at least, in my concept of this court, I don't think it is necessary.

I can say that, in so far as using the word "stunt" that we have referred to here, there was no trick photography in that dueling stunt at all. There is no doubt about that.

The Court: Let's hear from the other side. Confine your argument to the dueling contest, counsel. I am not going to hold walking across that plank was a daring stunt.

Mr. Williams: I think it might be of assistance to the court if I referred to the evidence as to how that stunt action was actually portrayed.

The Court: I think I recall the evidence.

Mr. Williams: Mr. Cavens said that he did the entire fencing sequence with Mr. Lancaster, that it was photographed in its entirety with him portraying the part of Alessandro, and Mr. Lancaster playing the part of Dardo, and then he said that thereafter Mr. Lancaster did the entire thing with Robert Douglas, and then that in the actual makeup of the picture they interspersed, he said, two over-shoulder shots. Now, did he do that fencing? Assuming it is or is not a stunt, regardless of that, did he do that?

The evidence, and the only evidence—the evidence of [253] Mr. Cavens and the evidence of Mr. Lancaster himself is that he did the entire scene, and it was entirely photographed. I asked him:

"Q. Now, we come to the duel scene between you and the character Alessandro, which is played by Douglas, the actor Douglas, that duel scene in which you fight in the corridor and in which he is finally shown to be killed. Did you yourself do the entire action of that duel scene so far as the part Dardo is concerned?

"A. Yes, I did, and it was photographed that way."

Then at another place:

"Q. There was no part of the actual fencing in that particular sequence that you did not yourself personally do, was there?

"A. I did the entire sequence, yes, sir."

In the making of motion pictures they take a lot of additional short shots to fill in with master shots. The master shot, as Mr. Cavens described, was the shot showing the entire sequence. Then as they make up a picture, they cut a part here, and cut a part there, and sometimes shoot another angle, and for some reason or other maybe it is better photography, or maybe they get a little better lighting effect, and they will use one little short shot in that [254] sequence, but when the sequence is finally made up it looks like a continuous sequence. But it is actually made up of sequences which were perhaps done over a matter

of several days, and with many different cameras, and at different times.

So that what Burt Lancaster did was to do the entire sequence, and in this particular case—it might have been in others—in this particular case, as has been definitely stated, Mr. Cavens, who knows well, said there were only two little shots in which a rear view of the character Dardo was shown with Turner in that part.

Now, if that isn't doing the action, I don't know what it is.

Now, as your Honor has pointed out, we had here a very considerable inconsistency. On the one hand, they refused to accept the stunt men's definition, and we were in a position to develop the thing for you, and beyond any question.

The Court: What do you say about the offer of the reward?

Mr. Williams: Does your Honor want to go into that now?

The Court: I was just wondering, in view of the evidence here, whether you were going to take the position that the plaintiff did not make an offer of reward.

Mr. Williams: Yes, if your Honor please, I don't think that the defendant made an offer of reward for two reasons, and I could connect it fully for you, with cases. The first [255] is that the language of the so-called offer is not the language of an offer.

The Court: That is trick language, isn't it?

Mr. Williams: It is a recital——

The Court: It is trick language?

Mr. Williams: I think so. I don't like it at all myself, but we are talking about whether people contracted. They did not contract, whether I like it or whether your Honor likes it, and if I had been consulted in the matter or your Honor had been consulted in the matter, it would never have been done to start with. It was one of the——

The Court: Neither you nor I ever thought of the figure $1,000,000.

Mr. Williams: I might have thought of it, but I would not have known what it meant.

If your Honor please, of course we can't delve into the vagaries of the mind of a publicity man. That is entirely beyond by comprehension, but the language itself is not the language of an offer.

The Court: There is one defect in that offer, no matter how you size it up, it seems to me. I haven't discussed it, because I have some different views,—that the offer was not made until he was notified it was withdrawn.

Mr. Williams: You mean the acceptance?

The Court: Yes, the acceptance of the offer.

Mr. Williams: I think the evidence is clear on that. He was informed the offer was withdrawn before he made any acceptance at all.

The Court: But I want to say, frankly, that I think that that publicity and advertising was misleading, as far as the public was concerned, and

it was purposely made for the purpose of misleading the public. They gave the impression that it was their intention that a reward of $1,000,000 was being offered, and they were relying all the time upon the defects in the so-called offer, and that would have the tendency to mislead the public into believing an actual offer had been made. In this case I am satisfied that the plaintiff, before Mr. Mascus wrote the letter, had been notified that the offer of reward had been withdrawn, as far as that is concerned.

Mr. Williams: I am sure of that, your Honor.

The Court: And I think I have listened to enough argument, and maybe more than I am accustomed to, but I feel that so long as they are using the courtroom for a publicity stunt that we might as well let them use it, and go along with it. But I feel that the reason that cannot possibly be considered as an offer, in my view, is the newsreel. It says, "perform his daring stunts," and it is my view that there is no evidence here that Burt Lancaster did not perform his daring stunts. [257]

There is some evidence of so-called doubling there, and fake photography, but so far as the daring stunts are concerned, I find that Burt Lancaster did perform them, notwithstanding the fact I feel it is too bad that this court can't find sufficient evidence to chastise the defendants for fake advertising.

Mr. Swartz: Your Honor, I just want to be heard very briefly. May I say this?

I don't know what is going to happen after this hearing. I assure you we did not come into this on a publicity basis.

The Court: I am not saying that.

Mr. Swartz: You know, your Honor——

The Court: As counsel knows, I have tried to get this case cleaned up without making a public spectacle out of it, and I have felt, and I still feel that this case could have been gotten off our docket, the expense to the Government saved, and with a far less amount expended than this case has cost to try.

Mr. Swartz: I tried to, of course.

I would like also to say this, your Honor, before you leave the bench. Your Honor mentioned this in your ruling on law earlier, that it wasn't what they thought they said in the offer, the question was if the terms were promissory in any respect, or ambiguous; that it was in the position that the public so understood. Now, they did not make the [258] offer as an idle gesture. They wanted people to come into theatres, and if there are going to be findings, we want findings, and we would like to have the court indicate what it is going to do about this, because I represent that——

The Court: I want to say that I believe the evidence indicates before you wrote your letter accepting the offer, if there had been any offer, it had been withdrawn.

Mr. Swartz: We are not relying on a written acceptance. Mr. Williams tried to get us to do that,

and I refused to do that. We are relying on a telephone conversation which Mr. Gordon Files testified to. He accepted the offer. He didn't use the word "acceptance." He said he wanted it, and talked about it, but Mr. Files said he told him he didn't know anything about it. There was no withdrawal of the offer at that time. An offer can be accepted orally, as well as in writing, and I think the court's interpretation that we are relying on the written offer is not in accordance with the facts, and we would like that in the findings.

The Court: I know, counsel, you worked very diligently on this case, and I have rather admired your diligence in working on it. I thought you had a better case than you presented here. You may think you presented a good case. I don't think that you have shown here that Burt Lancaster did not perform any of the daring stunts. I don't believe you have done that. [259]

Mr. Swartz: Then let me say this: If your Honor makes findings on that, of course, we have the film here, and it is an exhibit by reference.

The Court: I am perfectly willing to make any such findings you want for the purpose of appeal. I will not make any trick findings, such as will tie you up on appeal,——

Mr. Swartz: No. I am talking about the offer of acceptance, your Honor.

The Court: ——because I always want people to appeal any case where they feel they have been done an injustice, or that I have made an incorrect

ruling, because if I ruled in error in any respect, it should be corrected on appeal.

Mr. Swartz: I am not suggesting we are or are not going to appeal. All I will say——

The Court: Don't worry about that. You don't have to worry about me when it comes to appeals. I have had plenty of appeals, and know what they are. I have had plenty of reversals, and have had my share of affirmances.

Mr. Swartz: I am sure of that, your Honor.

The Court: And I am willing to take my risk and my chance, and if I am in error, I want the Circuit Court to correct it, and if I have done you or your client an injustice by ruling against you, because I always feel when I make a ruling, and it is contrary to law or the evidence, that I have hurt your client unfairly, and that unfairness [260] should be correct, and that is the job of the Circuit Court.

Mr. Swartz: Yes, your Honor. I am sorry if I raised my voice. It was only because I was so intensely interested.

The Court: I can understand that, because you people have been working on this case for three years, and I really feel that this case has been a case where the public has been misled, as far as that is concerned. By trick photography, and so forth, I think the public has been misled.

My sympathies are somewhat with you in this litigation, and have been. But you have to produce the evidence here, and you haven't done it, so there

is only one thing I can do, and that is rule against you.

There is no reason for taking this under submission. It will just make you that much more work, and you have done too much already. Both sides have, and the other side will certainly get their pay.

Mr. Williams: Thank you, your Honor.

The Court: Judgment will be for the defendants, and the defendants' counsel will draw the necessary findings.

Mr. Williams: Yes, your Honor. [261]

[Endorsed]: Filed April 16, 1954.

THE MIRROR—LOS ANGELES, MON., JULY 17, 1950

AP WIREPHOTO

BURT LANCASTER BACKS UP HIS OFFER
Seeing is believing to Kendis Rochlen.

THERE'S A $1,000,000 FOR YOU; JUST PROVE BURT DIDN'T DO IT

Things can't be so bad in the movie business. Warner Bros. offered to give away $1,000,000 today.

It's waiting in cash for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in a new picture.

In "The Flame and the Arrow," apparently no drawing-room drama, Lancaster performs somersaults from horizontal bars, walks across a pole 35 feet above ground, and scales walls like a window washer gone berserk.

Virginia Mayo costars with Lancaster in the film. Enough to make any man acrobatic.

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deal with. Dr.
ld that, "you
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k is completed,
ill be made to
home in every
ices," Dr. Beau-

says:

PLAINTIFF'S EXHIBIT No. 4

From: Warner Bros. Studios
Burbank, Cal.—HO-91251

Bill L. Hendricks—71350

The producers of "The Flame and The Arrow," soon to be distributed by Warner Bros., have a million dollars to give away.

The sum is offered to anyone who can prove that Burt Lancaster did not himself perform all the stunts attested to by the stunt men who worked in the picture.

Daring exploits performed by Lancaster in "The Flame and The Arrow" include giant somersaults from six horizontal bars, walking across a pole thirty-five feet in the air, human pyramids, wall scaling and gymnastics performed atop a pole held by sturdy, 145-pound Nick Cravat, Burt's lifelong friend and former circus partner.

The million dollar offer was made yesterday as Lancaster went into the vaults of the Bank of America to film Warner Pathe newsreel scenes in which the reward offer is made.

Virginia Mayo co-stars with Lancaster in "The Flame and The Arrow," a Norma-F.R. production for Warner Bros. release. The film was directed by Jacques Tourneur.

From Warner Bros. Studio, Burbank, Calif., H091251 Ned Moss.

In one of the most unusual documents ever executed in Hollywood, 10 of the leading stunt men in motion pictures have signed an affidavit attest-

Plaintiff's Exhibit No. 4—(Continued)

ing to the fact that Burt Lancaster did all his own stunts in "The Flame and The Arrow," a Norma-F.R. production in Technicolor for Warner Bros. distribution.

The 10 stunt men swore they "were present at Warner Bros. studio on the set of 'The Flame and The Arrow' at all times during the production of the Technicolor picture when Burt Lancaster personally performed the stunts, which in the affiants' opinion have never been performed before by any star in any one picture."

Lancaster, who co-stars with Virginia Mayo in the swashbuckling film, was a circus aerialist and acrobat before coming to Hollywood. Among his feats of derring-do in the picture were somersaults and pirouettes from horizontal bars 20 feet above the ground, climbing a 25-foot pole balanced on the forehead of featured player Nick Cravat, climbing a 30-foot rope hand over hand, walking across a pole tight-wire fashion 35 feet in the air without a net and various riding and action stunts in battle scenes.

The 10 stunt men who signed the affidavit are Allen Pomeroy, Louis G. Tomei, "Sailor Billy" Vincent, Mickey McCardle, Boyd "Red" Morgan, Allen Wyatt, Glenn Thompson, Charles F. Norvath, Paul Baxley and Joe P. Smith.

There's going to be no doubt about who did the stunts in "The Flame and The Arrow" if 10 of Hollywood's leading stunt men have anything to say about it. The stunts, they depose, swear and

Plaintiff's Exhibit No. 4—(Continued)

otherwise declare, were done by none other than Burt Lancaster himself.

In an affidavit signed by the 10 stunt men and executed by a notary public, the stunters swear that "Burt Lancaster alone, without the aid of trick photography or trick means," did the Burt Lancaster stunts for "The Flame and The Arrow," a Norma-F.R. production for Warner Bros. distribution.

Among the death defying deeds listed as having been performed by Lancaster, former circus aerialist and acrobat, for the love of his leading lady, gorgeous Virginia Mayo, are some of the most dangerous tricks ever performed before a camera.

The stunt men, Allen Pomery, Louis G. Tomei, "Sailor" Billy Vincent, Mickey McCardle, Boyd "Red" Morgan, Allan Wyatt, Glenn Thompson, Charles F. Horvath, Paul Baxley and Joe P. Smith, swear in the affidavit they "were present at Warner Bros. studio on the set of 'The Flame and The Arrow' at all times during the production of the Technicolor picture when Burt Lancaster personally performed the following stunts, which in the affiants' opinion have never been performed before by any star in any one picture:

"Executed somersaults and pirouettes from horizontal bar to horizontal bar (six in all) 20 feet above the ground, with swing up from one bar to the other, upstanding on one foot. From last bar he dropped 10 feet to a balcony, where Nick Cravat

Plaintiff's Exhibit No. 4—(Continued)

approached with pole on which he slid to the ground for a grand finale.

"Climbed up a 25-foot pole balanced on the forehead of Nick Cravat, to finish off in a performance resembling a flag, and so called, professionally, a 'flag.'

"From 35 feet in the air, walked across a pole in tight-wire fashion from ledge to ledge, with no net underneath.

"Climbed a 30-foot rope, hand over hand.

"Received Nick Cravat in his arms from high jump and tossed Cravat away in a somersault in swing time.

"Executed a 'three man high' in the company of Nick Cravat and one, with finish off including a lean to ground, fall and then a roll over.

"Various and sundry riding and action stunts in battle scenes and combat encounters, as well as hand-to-hand fight and sword duel with Robert Douglas."

And that's the low-down from 10 of Hollywood's bravest stunt men, who themselves make a living performing death-defying antics for the cameras. It marks the highest praise Burt Lancaster could ever receive.

[Endorsed]: Filed July 21, 1953.

PLAINTIFF'S EXHIBIT No. 5

Prepared Script as Okayed by Mr. Obringer 7/11/50

NEWSREEL

Close Shot. A Pile of Money. (Moving Camera). It is piled on the floor of a bank vault. Camera Pulls Back to reveal Burt Lancaster counting it, dollar by dollar.

Narrator's Voice: (Over above). The producers of "The Flame and The Arrow" offer a reward of one million dollars to anyone who can prove that Burt Lancaster did not himself perform all the stunts attested to by the stunt men who worked in the picture.

Lancaster has reached the last of the huge pile of bills.

Burt: 999,998; 999,999—one million! (he wipes his brow) I had to count it three times to make sure.

Int. Bank Vault. Another Angle: As three girls enter—Kendis Rochlen, Maralyn Marsh, and Ann Helming:

Kendis: Mr. Lancaster, I'm Kendis Rochlen of the Los Angeles Mirror. Is this on the level?

Burt: It's so much on the level, I'm trying to figure out a way to win it myself.

Maralyn: Burt, I'm Maralyn Marsh of International News Service. I just saw "The Flame and The Arrow"—and you can't make me believe that

Plaintiff's Exhibit No. 5—(Continued)

was you doing those somersaults from six horizontal bars, fifty feet in the air!

Burt: Look, before I got lucky in Hollywood I made by living in a circus. I used to do that stuff for coffee and doughnuts.

Maralyn: What happened if you missed?

Burt (shrugging): Somebody got an extra doughnut.

Ann: Mr. Lancaster, I'm Ann Helming of The Hollywood Citizen News. It's hard to believe the producers want to give away a million dollars.

Burt: They really don't want to give it away. But it's a bona fide offer. So if anybody wants it, they're going to have to fight for every dollar!

Ann: What if somebody proves it wasn't you, walking across a pole thirty-five feet in the air?

Burt: They'd get the million—and I'd go back to coffee and doughnuts.

Kendis (to the others): Come on, girls—let's run "The Flame and The Arrow" again!

They start out. The girls move together. Burt puts his arms around all three of them and clasps them tightly.

Maralyn: Now what?

Burt: Nothing—this is good enough for me! He winks into camera as we
Fade Out.

[Endorsed]: Filed July 21, 1953.

PLAINTIFF'S EXHIBIT No. 6

ACTUAL NEWSREEL SCRIPT

Anner.: In Hollywood, Burt Lancaster counts the one million dollar reward offered by Warner Bros. to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in "The Flame and The Arrow."

Lancaster: 999,998, 999,999, One million dollars. I had to count it three times to make sure.

Girl: Here he is, ladies.

Rocklin: Hello, Burt. I'm Miss Rocklin of the Los Angeles Mirror.

Lancaster: How do you do?

Rocklin: Tell me, is this really on the level?

Lancaster: Really on the level? Well, so much so that I'm trying to figure how to win it myself.

Marsh: Burt, I'm Marilyn Marsh of International News Service.

Lancaster: How do you do, Ma'am?

Marsh: I just saw you in "The Flame and The Arrow." Now look. You can't make me believe that it was you doing those summersaults from, what was it, six horizontal bars, 50 feet in the air?

Lancaster: Sixty feet. Why not? Before I got lucky in Hollywood, I used to make my living in the circus. I did stuff like that for coffee and donuts.

Marsh: What happened if you missed?

Lancaster: Somebody got an extra donut.

Helming: Burt, I'm Ann Helming of the Hollywood Citizen-News.

Plaintiff's Exhibit No. 6—(Continued)

Lancaster: Well, hello.

Helming: It's hard to believe that any producer wants to give away a million dollars.

Lancaster: Well, Ann, they really don't want to give away a million dollars if they can help it. But this is a genuine, bona fide offer.

Helming: What if somebody proves that it wasn't you who walked across the pole 35 feet in the air?

Lancaster: If anybody can prove that, they'll get the million dollars and I'll go back to coffee and donuts. Satisfied?

Rocklin: Sounds good enough for me. Come on, girls, let's take another look at "The Flame and The Arrow."

[Endorsed]: Filed July 21, 1953.

PLAINTIFF'S EXHIBIT No. 7

This Agreement, made and entered into this 8th day of July, 1949, by and between Norma Productions, Inc., a California corporation, having its principal business office located at 8747 Sunset Blvd. in the City of Los Angeles, State of California, hereinafter referred to as the "Producer", and Warner Bros. Pictures, Inc., a Delaware corporation, having its principal business office at 321 West 44th Street, New York City, New York, hereinafter referred to as "Warner";

Witnesseth:

Whereas, the Producer is engaged in the business of producing photoplays and distributing

Plaintiff's Exhibit No. 7—(Continued)

and/or causing the distribution of the same throughout the world; and

Whereas, Warner is also engaged in the business of producing photoplays at its studio at Burbank, California, and distributing and/or causing its subsidiaries to distribute the same throughout the world; and

Whereas, the Producer desires to produce one photoplay and to have Warner completely finance the production thereof by advances to Producer by way of loans or credits, or both, as hereinafter referred to, and upon the completion of said photoplay to grant Warner, by way of exclusive license for the period hereinafter referred to, the right to distribute or cause to be distributed said photoplay and trailer thereof throughout the world, upon the terms and conditions hereinafter set forth; and

Whereas, Producer has advised Warner that Mr. Burt Lancaster will portray the leading male role in said photoplay, and that the final screen play to be used as the basis of said photoplay shall be based upon the story entitled "The Hawk and The Arrow", said screen play having heretofore been written and composed by one Waldo Salt, and that Mr. Harold Hecht will supervise the production thereof; and

Whereas, Warner is willing to furnish or make available to Producer at its studio at Burbank, California, or at such other place in the State of California to which Warner may transfer the major portion of its production activities, all necessary

Plaintiff's Exhibit No. 7—(Continued)

physical facilities, material, equipment and, if and when requested, personnel normally and customarily required for the production of the photoplay contemplated hereunder, in order that the Producer may use said studio facilities and personnel for such purpose; and

Whereas, as an inducement to Warner to enter into this agreement, the Producer represents to Warner that it is a corporation duly qualified to do business in the State of California, and that it will produce said photoplay with an experienced staff and personnel in all respects adequate to produce a so-called "Class A" photoplay, as such term is known and understood in the motion picture industry, and which said photoplay shall be of the general type and quality of those of similar cost heretofore produced by Warner and distributed by Warner and/or its distributing subsidiaries; and

Whereas, Warner, in the financing of the production of each said photoplay, is willing to advance to the Producer by way of loans, in the manner hereinafter set forth, seventy per cent (70%) of the direct cost of producing said photoplay, with Warner financing the remaining thirty per cent (30%) of the direct cost of said photoplay by way of credits, as hereinafter referred to;

Now, Therefore, in consideration of the mutual covenants and agreements of the parties hereto and of the representations and warranties of the Producer, as in this agreement set forth, it is hereby agreed as follows:

Plaintiff's Exhibit No. 7—(Continued)

1. Warner agrees to furnish, and Producer agrees to purchase, let, rent or hire from Warner, all physical facilities, material, equipment and, if and when requested, personnel normally and customarily required for the production of the photoplay and contemplated hereunder, all of which are defined for the purpose hereof as "facilities", which term shall include, without limiting the generality of the foregoing, all reasonable and necessary studio facilities, stages, sets, set dressings, props, wardrobe, material and supplies (including negative raw stock, if available), sound equipment other than electrical equipment, a fair proportion of available electrical equipment, electricity and other untilities, transportation, labor, cameramen, cutters, cutting rooms, dressing rooms, laboratory facilities with competent and experienced personnel for the processing of production negatives, rushes and dailies, publicity personnel, clerical assistants and other personnel and technical assistants needed for the proper production of said photoplay, together with all facilities and equipment required or as may be reasonably necessary in connection with the production of said photoplay. Warner further agrees to furnish the Producer with reasonable and necessary continuous office facilities and furnishings for its own use, but only in connection with its production activities with respect to the photoplay produced hereunder. No facilities which are supplied to the Producer hereunder, for which Pro-

Plaintiff's Exhibit No. 7—(Continued)

ducer is not charged, shall be deemed sold to the Producer, and all such facilities (including, but not limited to, sets, set dressings, props, wardrobe, material, equipment and supplies) shall be and remain the property of Warner. In the event that any facilities, which are charged to the cost of production of said photoplay, are not entirely consumed in the production thereof so that salvage value remains in such facilities, then and in that event the salvage value thereof shall be credited to the cost of production of said photoplay, which said salvage value, for the purposes hereof, shall be deemed to be twenty-five per cent (25%) of the cost thereof in the event such facilities are retained by Warner or Producer. Warner's obligation to furnish Producer facilities hereunder shall be subject to the same being available for Producer's use at such time or times as will not interfere or conflict with the production plans of Warner with respect to Warner's use of the facilities involved.

With respect to the personnel of Warner whose services are required by Producer, it is agreed, subject to the provisions of paragraph 4 hereof, that Producer shall make known to Warner its requirements of such personnel and Warner, in turn, shall submit or make known to Producer the names of available personnel of the class or type requested by Producer, but in this connection it is expressly understood and agreed that Warner shall not be obligated hereunder to submit to Producer the names of any of its personnel who may

Plaintiff's Exhibit No. 7—(Continued)

at such time be engaged in production activities for Warner or others or who may at such time be assigned, or who are contemplated by Warner to be assigned, to production activities for Warner or others. Upon Warner's making known or submitting to Producer the names of any personnel of the particular type or class desired by Producer, Producer shall have the right to make its own selection of such personnel, such as, but not limited to, cameramen, cutters and other creative and semi-creative personnel. All key personnel, such as costume designers, composers, artists, writers and directors, whose services may be furnished Producer by Warner hereunder shall be furnished Producer under a so-called "lending" agreement, which said lending agreement shall include terms and conditions customarily included by Warner in its lending agreements involving the same type personnel. It is agreed that Producer shall select and engage an assistant supervisor of production to render such type duties in connection with each photoplay produced hereunder. It is further agreed that Producer shall select and engage, with respect to said photoplay, a secretary who shall render such type services to the supervisor of production. It is agreed, however, that Producer shall not be entitled to charge, as a part of the direct cost of producing said photoplay, for the services of any said assistant supervisor of production a sum in excess of Three Hundred Fifty Dollars ($350) per week, and not in excess of the aggregate sum of Five

Plaintiff's Exhibit No. 7—(Continued)

Thousand Dollars ($5000), and that the compensation to be paid said secretary shall not exceed the weekly compensation customarily paid by Warner to its secretarial help performing the same type of duties and services. If Producer shall make use of any said talent in the employ of Warner, the cost to Producer therefor shall be on the basis and in the same manner and method that Warner uses in charging services of such talent to its own photoplays. In this connection, Producer shall be entitled to assume that it shall be charged for all personnel furnished Producer on a weekly or per diem basis at their regular weekly, daily or hourly rate of compensation, unless Producer is advised by Warner to the contrary prior to Producer's use of the services of the personnel involved; provided, however, it shall be incumbent upon Producer to inquire as to the charges to be made it for the services of artists, costume designers, composers, directors and writers prior to Producer's use of the services of such type personnel and, moreover, it shall be optional with Producer as to its use of the services of such type personnel. Warner shall keep a record of the cost to it of all facilities furnished or made available to the Producer pursuant to this paragraph 1 according to its regular accounting practice and in the same manner in which it keeps accounts of photoplays produced by it.

It is agreed that until the direct cost of said photoplay has charged thereto a sum equal to seventy per cent (70%) of the budgeted direct cost

Plaintiff's Exhibit No. 7—(Continued)

thereof, which said seventy per cent (70%) shall be advanced by Warner as herein provided for and first expended in connection with the production of said photoplay, Warner shall bill Producer weekly, in accordance with the current and established accounting practice of Warner, for all or such portion of said seventy per cent (70%) of said budgeted direct cost which represents credits allowed Producer by Warner resulting from Warner's furnishing Producer studio facilities and personnel in connection with the production of said photoplay. When the direct cost of said photoplay has reached the sum of seventy per cent (70%) of the budgeted cost thereof, then thereafter Warner agrees to furnish, by way of studio facilities or personnel, the additional financing necessary to completely produce said photoplay, including the trailer thereof, such studio facilities and personnel furnished by Warner, as aforesaid, to be charged as a direct cost of said photoplay and to be included in the budget thereof to be prepared by Producer as herein provided for, except such amounts thereof which are included in the overhead charge to be made by Warner to the direct cost of said photoplay, as in paragraph 7 hereof provided for. Warner agrees to keep at its studio at Burbank, California, full, true and accurate books of accounts, together with vouchers and receipts, representing the charges or costs of Warner in furnishing Producer studio facilities and/or personnel, as aforesaid, and, as well, full, true and

Plaintiff's Exhibit No. 7—(Continued)

accurate books of accounts, together with vouchers and receipts, representing the cost to Warner of financing, by way of studio facilities or personnel, the completion of said photoplay from and after the time the direct cost thereof has reached seventy per cent (70%) of the budgeted cost thereof, as above referred to.

Warner shall furnish Producer with statements at intervals during the period commencing with the start of production of said photoplay and ending when the production thereof is completed, which said statements shall show the current direct cost of producing said photoplay and the amount of such direct cost financed and/or contributed by Producer, as herein provided for, and the amount of the additional direct cost of said photoplay representing the financing thereof as undertaken by Warner hereunder. All such statements shall be subject to change in order to give effect to any items overlooked in the preparation thereof or to correct any error in the computation of any items included therein. Warner agrees that the Producer shall have the right, during reasonable business hours within a period of two (2) years from the completion of production of each photoplay, at Producer's cost and expense, to examine and take excerpts from the books, records and accounts maintained by Warner, for the purpose of inquiring into any records or transactions relating to the advances, credits or charges for studio facilities or personnel furnished Producer by Warner or

Plaintiff's Exhibit No. 7—(Continued)

furnished by Warner hereunder in connection with the production of said photoplay.

The Producer agrees that the proceeds of the loan, hereinafter referred to, to be made to it by Warner with respect to said photoplay shall be expended only to defray costs and expenses directly incurred in connection with the production of said photoplay: provided, however, it is agreed that in the event the actual cost of any items included in the budget of said photoplay shall exceed the budgeted cost thereof, such excess cost, if attributable to the actual cost of producing said photoplay, shall, nevertheless, be included as a part of the direct cost of producing said photoplay, and shall, after the expenditure by Producer of the first seventy per cent (70%) of the budgeted direct cost of said photoplay, be financed by Warner as herein provided for. Producer agrees to keep full, true and accurate books of accounts, together with vouchers and receipts, representing production expenditures of said photoplay made by Producer, exclusive of studio facilities and/or personnel furnished Producer by Warner hereunder. Producer agrees that Warner shall have the right during reasonable business hours, within a period of two (2) years from the completion of production of said photoplay, at Warner's cost and expense, to examine and take excerpts from the books, records and accounts maintained by Producer with respect to said photoplay, for the purpose of inquiring into any records or transactions relating to Pro-

Plaintiff's Exhibit No. 7—(Continued)

ducer's financing of said photoplay. It is expressly agreed that all financing made by Warner hereunder by way of cash, credits and/or facilities in connection with the production and/or distribution of said photoplay shall be repaid to Warner only from funds or proceeds derived from the rental and distribution of said photoplay in the manner in this agreement provided for, and the Producer shall not be liable to Warner for the repayment to Warner of any advances or financing made to Producer by Warner hereunder from any other assets of Producer.

It is understood that, upon the apparent completion by Producer of the photoplay produced hereunder, Warner may desire to dismantle and remove all sets or settings used by Producer in connection with the production thereof and to make such stage space and sets available for the production of other photoplays. Accordingly, it is agreed that when Producer shall have apparently completed production of said photoplay, should Warner desire to dismantle and remove all or some of the sets or settings used by Producer, Warner shall make such fact known to Producer, and, if Producer shall require any such sets or stage space to be maintained and not dismantled for Producer's further use thereof, Producer shall promptly notify a responsible officer of Warner and Warner, under such circumstances, will use its best efforts to maintain such sets or stage space in order to accommodate such further reasonable requirements and

Plaintiff's Exhibit No. 7—(Continued)

use thereof by Producer. Should the Producer not make known to Warner that it desires to make additional or further use of the sets or stage space involved, as aforesaid, then and in that exent Warner shall have the full and unrestricted right to dismantle all or any part thereof.

2. With respect to the financing of the photoplay contemplated hereunder, it is agreed, as hereinbefore set forth, that Producer shall finance the first seventy per cent (70%) of the direct cost of producing said photoplay, and the balance of the financing of said photoplay, including the production of a trailer thereof, shall be furnished by Warner. In this connection, Warner agrees to advance by way of a loan to Producer in the aggregate a sum equivalent to seventy per cent (70%) of the budgeted direct cost of said photoplay, representing a fund to be used exclusively by the Producer for the purpose only of financing seventy per cent (70%) of the direct cost of said photoplay. Said seventy per cent (70%) sum shall be advanced by Warner to the Producer as follows, to wit: During the term hereof and prior to the commencement of actual physical production of the photoplay to be produced hereunder, Producer, upon request, shall be advanced by Warner such sum or sums as Producer may reasonably require, not to exceed in the aggregate the sum of One Hundred Thousand Dollars ($100,000), for so-called pre-production expenditures in connection with the direct cost of the photoplay to be pro-

Plaintiff's Exhibit No. 7—(Continued)

duced hereunder, and all such advances shall be accounted for by Producer as a part of the direct cost of said photoplay. Should Producer not account to Warner for all of said pre-induction advances as a expenditure for actual direct cost of production of said photoplay, then and in that event Producer shall, upon demand, refund to Warner any such unaccounted for advances, or Warner, at its option, may deduct and retain as its own, from any and all proceeds payable to Producer under the provisions of subdivision (i) of paragraph 11 hereof, the amount of such unaccounted for advance. The balance of said seventy per cent (70%) shall be advanced by Warner to Producer in eight (8) equal weekly installments, the first of which installments shall be paid to the Producer on Wednesday of the week next following the preceding Saturday of the week during which actual physical production of said photoplay shall have commenced, and a similar installment shall be paid Producer by Warner on Wednesday of each of the next succeeding seven (7) weeks. The Producer agrees to issue its promissory notes in the form attached hereto marked "Exhibit 2" covering each aforesaid advance and installment, each note to be dated as of the date each such advance and installment is paid to the Producer and to provide for interest on the principal sum of each note at the rate of four per cent (4%) per annum from date until paid, the payment of said notes and interest thereon to be made by Producer

Plaintiff's Exhibit No. 7—(Continued)

as provided for under subdivision (VI) of paragraph 11 (a) hereof, said notes to carry a notation or statement on each thereof that the same are made subject to the provisions of this agreement. It is agreed that all financing made by Warner hereunder by way of cash, credits and/or facilities in connection with the production of said photoplay shall bear an interest charge thereon to be made by Warner at the rate of four per cent (4%) per annum until paid, said financing, together with said interest charge thereon, to be recouped and repaid to Warner as provided for in subdivision (V) of paragraph 11 (a) hereof. In this connection, and for the purpose of determining the amount of interest to be charged by Warner in connection with its financing hereunder, it is agreed that the amount of the weekly accrued cost of production of said photoplay financed by Warner (as distinguished from the financing of said photoplay by Producer) shall be the amount used as the basis of computing said interest charge, and said interest shall be charged from the date of such respective weekly accrued cost until the payment thereof, as in this agreement provided for. It is further agreed that the above referred to advance and weekly installments made by Warner to Producer shall be deposited in a bank to be selected by Producer and designated "Norma Productions Special Account", and that said depositary shall be directed to honor and pay checks, drafts, and other instruments or orders for the payment of money drawn

Plaintiff's Exhibit No. 7—(Continued)

against said deposit when the same are signed by one of two persons to be designated from time to time by Producer, representing Producer, and either F. E. Witt or C. H. Wilder, representing Warner, and Producer agrees to take such steps as are necessary to effectuate the foregoing arrangement.

3. The term of this agreement shall commence August 15, 1949, and on or before said date Producer agrees to deliver to Warner the final screen play intended to be used as the basis of the photoplay hereunder, and, conditioned upon Producer so delivering said final screen play and Warner making available to Producer the reasonable studio facilities required for the production of said photoplay, as hereinbefore referred to, Producer agrees to commence, on or before the expiration of a period of five (5) weeks subsequent to said date of August 15, 1949, actual physical production of said photoplay.) The Producer agrees to diligently and economically proceed with the production of said photoplay until fully completed, and, when completed, to deliver said photoplay to Technicolor Motion Picture Corporation as in paragraph 8 hereof provided for. The Producer covenants that the photoplay produced by it hereunder will be produced by it in such fashion and manner so that Producer and/or Warner shall be entitled to receive a Production Code Certificate from the Motion Picture Producers Association of America, Inc. with respect thereto. [See 8-3-49 letter amend.]

Plaintiff's Exhibit No. 7—(Continued)

[Warner Bros. Pictures Inc. Letterhead]

Norma Productions, Inc. August 3, 1949
8747 Sunset Blvd., Los Angeles, Calif.

Gentlemen:

With reference to that certain agreement between us dated July 8, 1949, relating to the production of the picture based upon the story "The Hawk and the Arrow", this will confirm the following understanding and agreement between us with respect thereto:

The first sentence of paragraph 3 of said agreement shall be deemed deleted and stricken therefrom and the following sentence shall be deemed inserted therein and shall have the same force and effect as though written into said paragraph 3 of said contract at the time of the execution thereof by each of us:

"The term of this agreement shall commence August 15, 1949. On or before August 31, 1949, Producer agrees to deliver to Warner the final screen play intended to be used as the basis of the photoplay hereunder, and, conditioned upon Producer so delivering said final screen play and Warner making available to Producer the reasonable studio facilities required for the production of said photoplay, as hereinbefore referred to, Producer agrees to commence actual physical production of said photoplay during the period September 19, 1949 to October 3, 1949, both dates inclusive."

Except as hereinabove specifically set forth, said contract of July 8, 1949, shall not be deemed other-

Plaintiff's Exhibit No. 7—(Continued)

wise changed, altered, modified or affected in any manner whatsoever.

If the foregoing is in accordance with your understanding of our agreement, kindly indicate your approval and acceptance thereof in the space hereinbelow provided.

Yours very truly,

Warner Bros. Pictures, Inc.
/s/ By R. J. Obringer,
Assistant Secretary

Approved and Accepted:
Norma Productions, Inc.
/s/ By Harold Hecht, Its Pres.

4. It is agreed that the principal members of the cast of said photoplay (including the stars or co-stars who may appear therein) and the roles to be portrayed by said members of the cast, the selection of the director to direct said photoplay, and the final editing and scoring of said photoplay shall all be subject to the written approval of Warner, the services of the aforesaid members of the cast and the director of said photoplay to be engaged and employed by Producer. In this connection, it is agreed that the said Burt Lancaster is hereby approved of by Warner to portray the star or leading male role in the photoplay to be produced hereunder. In this connection, Warner agrees that, upon the condition that the said Burt Lancaster shall portray the star or leading male role in said photo-

Plaintiff's Exhibit No. 7—(Continued)

play, and upon the further condition that Producer shall furnish Warner with evidence that the said Burt Lancaster and the supervisor of production have been fully compensated for their services in said photoplay, then and in that event, while the Producer may charge as a part of the direct cost of said photoplay the sum of One Hundred Seventy-five Thousand Dollars ($175,000), the Producer need not make any accounting to Warner for said sum of One Hundred Seventy-five Thousand Dollars ($175,000), which said sum shall be deemed the total cost for the services of the said Burt Lancaster and the said supervisor of production and for Producer's so-called overhead charge to the direct cost of said photoplay; provided, however, if Harold Hecht does not supervise the production of said photoplay said sum of One Hundred Seventy-five Thousand Dollars ($175,000) shall be reduced by the amount, if any, the permitted compensation for such supervisor, as determined pursuant to the next sentence, is less than Twenty-five Thousand Dollars ($25,000). It is agreed that Mr. Harold Hecht shall be deemed approved of as the supervisor of production of the photoplay to be produced hereunder; provided, however, should any person other than the said Harold Hecht be engaged by Producer to act as supervisor of production of said photoplay, such other supervisor of production and the compensation to be paid for his services shall be subject to the approval of Warner, it being the intent that the sum of Twenty-five

Plaintiff's Exhibit No. 7—(Continued)

Thousand Dollars ($25,000) allowed for the compensation of a supervisor of production, as referred to in paragraph 7 hereof, shall apply only to the said Harold Hecht.

In this connection, the Producer hereby represents and warrants to Warner that a valid and subsisting copyright shall exist in any copyrighted literary property that Producer may use as the basis of said photoplay, and, whether or not said literary property is copyrighted, Producer will own and be vested with, or be in a position to acquire, all necessary rights in and to said literary property and the copyright thereof, if copyrighted, in order to produce a photoplay based thereon, with and/or without sound synchronized therewith, and to produce, reproduce and transmit the same by radio, television and all other devices which are now, or may hereafter be, used in connection with the production and/or exhibition and/or transmission of any present or future kind of motion picture productions.

The Producer further represents and warrants that in its employment of any writers engaged by Producer to write and develop the screen play based upon the literary property used as the basis of the photoplay produced hereunder, it will secure from any and all such writers a full and complete assignment of all rights in said screen play. In this connection, the parties hereto agree that the original story and screen play shall be included in the budget at a sum of Twenty-seven Thousand Six

Plaintiff's Exhibit No. 7—(Continued)

Hundred Dollars ($27,600.00), notwithstanding the fact that the cost thereof to Producer may have been in excess of such sum.

Producer further represents and warrants that it now has, or will obtain and have, a binding and enforceable agreement with Mr. Burt Lancaster, pursuant to which it shall have the right to use the services of the said Burt Lancaster to portray the leading male role in the photoplay to be produced hereunder, and Producer agrees that the said Burt Lancaster will render his services as an actor, portraying the leading male role, in said photoplay.

The Producer further represents, warrants and agrees that it will not, without the written consent of Warner being first had and obtained, employ any person whomsoever in connection with the production of said photoplay, or acquire from any person, firm, agency or corporation any story or literary property used as the basis of the photoplay to be produced hereunder, who, as consideration for services rendered in connection with the production of said photoplay or for rights granted in and to any said story or literary property used as the basis thereof, shall have any participating interest of any nature whatsoever in the proceeds or interest to be derived by Warner and/or Distributor from the rental and distribution of said photoplay.

5. The Producer hereby further represents, warrants and agrees as follows: (a) that Producer has the right to enter into this agreement and to grant, transfer and assign to Warner all of the rights and

Plaintiff's Exhibit No. 7—(Continued)

licenses herein contained, and that there are not, and will not be, outstanding any claims, liens, encumbrances or rights of any nature against, or in or to, said photoplay or any part thereof, which can or will impair or interfere with the rights or licenses herein granted to Warner; (b) that neither said photoplay or any parts thereof (including the sound synchronized therewith) nor the exercise by any authorized party of any right granted to Warner hereunder will violate or infringe upon the trade-mark, trade name, copyright, patent, literary, dramatic, music, artistic, personal, private, civil or property right, or right of privacy, or any other right of any person, or constitute a libel or slander of any person, and that said photoplay will not contain any unlawful material; and (c) that Producer has not sold, assigned, transferred or conveyed, and will not sell, assign, transfer or convey, to any party any right, title or interest in or to said photoplay, or any part thereof, or the dramatic or literary property upon which said photoplay is based, and during the period of Warner's exclusive distribution license granted herein will not, and will not authorize any other person to, produce, distribute or exhibit any photoplay based, in whole or in part, upon such dramatic or literary property, and will not, and will not authorize any other person to, exercise any right to take any action which might tend to derogate from or compete with the rights herein granted or agreed to be granted to Warner. Notwithstanding anything to the contrary

Plaintiff's Exhibit No. 7—(Continued)

above in this paragraph 5 set forth, it is expressly understood and agreed that nothing herein contained shall be deemed to limit or restrict Producer's right to sell, assign, pledge or hypothecate Producer's interest, in whole or in part, in the proceeds to be derived by Producer from said photoplay, as in this agreement provided for, subject to the condition, however, that all and/or any such assignee or transferee shall join, at their own cost and expense (and give Warner written evidence thereof), in the appointment of not more than three (3) representatives for the purpose of exercising any right granted Producer under the provisions of subdivision (g) of paragraph 11 hereof to examine the books and records of Warner.

The Producer, at its own expense, hereby agrees to indemnify Warner, its assignees and licensees, and the officers, employees and agents of each of them, against, and hold them harmless from, any and all loss, damage, liability or expense, including attorney's fees, resulting from any breach of any of the warranties of Producer herein contained. If any action against Warner and/or any such assignee or licensee and/or any officers, employees or agents of any of them shall allege facts which would constitute a breach of any such warranty or shall be based on or constitute a claim for damages of any kind resulting from any matter or thing connected with the production of said photoplay caused by or within the control of Producer, Warner may, at Producer's expense, be represented by counsel

Plaintiff's Exhibit No. 7—(Continued)

retained by Warner or (if Warner so elects) by counsel retained by Producer, and may set off an amount equal to any obligation of Producer to Warner under this paragraph against any amounts payable by Warner to Producer under this agreement. Warner shall give Producer prompt written notice of the institution of any action or the making of any claim alleging a breach of warranty hereunder and Producer shall have the right to be represented by its own counsel in any such matter at its own expense. Each of the parties, however, agree to consult with the other in the selection of counsel so that expense of counsel may be minimized.

(a) If any person shall make any claim against Warner and/or its Distributor and/or any licensees of either of them involving any of the warranties made by Producer hereunder, and if any such claim or action shall appear to Warner to have such merit as to constitute a reasonable threat of damage, cost or loss, then Warner may thereafter withhold from any moneys payable to Producer under subdivision (i) of paragraph 11 of this agreement such amount as Warner may, in good faith, deem reasonably necessary or desirable for the purpose of protecting Warner and/or the Distributor and/or any licensees of either of them against any damages (including attorney's fees and expenses) which may be suffered as a result of said claim. Said money shall be held by Warner in a separate account and shall not be mingled with its general funds. It is agreed that Warner shall have the

Plaintiff's Exhibit No. 7—(Continued)

right, in good faith, to settle and pay any such claim which, in Warner's judgment, is of sufficient merit to constitute a reasonable probability of ultimate loss, cost, damage or expense, but in this connection Warner agrees to give due consideration to the views and opinions of Producer in the premises prior to making any such settlement. After the settlement of any such claim or after the final judicial determination of any such suit or proceeding involving such claim, said moneys so held by Warner shall be used for the purpose of paying to Warner and/or its Distributor the moneys, if any, due Warner or its Distributor pursuant to the provisions of this paragraph, or of paying any judgment or settlement with respect to such claim, suit or proceedings, and the balance, if any, shall be paid to the Producer. Nothing contained above in this paragraph shall be construed as a limitation of the liability of the Producer for breach of warranty, as above in this paragraph set forth.

(b) In the event any person shall make any claim against Warner, its Distributor and/or any licensees of either of them or against the Producer, which claim does not involve a breach of warranty by Producer or a claim for damages of any kind resulting from any matter or thing connected with the production of the said photoplay but does involve a claim for damages resulting from any act by Warner and/or Distributor which is a breach of its or their legal or contractual obligations in connection with the distribution or exploitation of

Plaintiff's Exhibit No. 7—(Continued)

said photoplay, then, and in that event, the liability for such acts by Warner and/or Distributor shall be solely the liability of Warner and/or Distributor.

(c) In the event any person shall make any claim against Warner, its Distributor and/or any licensees of either of them or against the Producer, which claim, in Warner's judgment, is of sufficient merit to constitute a reasonable probability of ultimate loss, cost, damage or expense, and which is not the separate liability of either party under the foregoing provisions of this paragraph, any damages (including attorney's fees and expenses) suffered by Warner and/or its Distributor or suffered by the Producer shall be treated as if such damages were an item of cost of distributing said photoplay. In the event any person makes such claim, Warner or its Distributor may thereafter withhold from the gross receipts derived from said photoplay such amount thereof as Warner or its Distributor may, in good faith, deem reasonably necessary or desirable for the purpose of protecting Warner and/or its Distributor or Producer against any damages or expenses which may be suffered as a result thereof. Warner or its Distributor shall keep such funds in a separate account and they shall not be mingled with its general funds. It is agreed that Warner shall have the right to settle and pay any such claim which, in Warner's judgment, is of sufficient merit to constitute a reasonable probability of ultimate loss, cost, damage or expense, but in this connection Warner agrees to give due consideration

Plaintiff's Exhibit No. 7—(Continued)

to the views and opinions of Producer in the premises prior to making any such settlement. After the settlement of any such claim or after the final judicial determination of any suit or proceeding involving said claim, Warner or its Distributor will use said moneys so withheld for the purpose of paying any judgment or settlement with respect to such claim, suit or proceeding, and the balance of such funds so withheld, if any, shall be accounted for as gross receipts hereunder.

6. With respect to the photoplay to be produced hereunder, the Producer agrees, not later than thirty-five (35) days prior to the commencement of principal photography of said photoplay, to deliver to Warner a copy of the final screen play upon which such proposed photoplay will be based.

7. Producer further agrees, not later than thirty (30) days prior to the date Producer commences the principal photography of said photoplay, to submit to Warner a budget which shall indicate the anticipated direct cost of production of said photoplay and the facilities required by Producer in order to produce the same. Such budget shall be in the general form of, and shall contain the general detail with respect to direct cost of production included in, budgets prepared by Warner for its own use, copy of such budget form being attached hereto and marked "Exhibit 1". Such budget shall include all anticipated direct costs of production, including, but not limited to, the cost of acquisition and development of the dramatic or

Plaintiff's Exhibit No. 7—(Continued)

literary property and the screen play to be used as the basis of said photoplay, as well as the cost of all other facilities contemplated in connection with the production thereof. As an item of direct cost of producing said photoplay, the Producer shall be entitled to include in said budget the sum of One Hundred Seventy-five Thousand Dollars ($175,000), which sum shall represent the aggregate compensation to be paid the said Burt Lancaster and the said Harold Hecht and any and all so-called Producer's overhead. In this connection, however, it is agreed that should the said Burt Lancaster, for reasons beyond the control of Producer, not portray the star or leading male role in said photoplay, then and in that event, as an item of direct cost of said photoplay, the Producer shall be entitled to include in the budget therefor the sum of Twenty-five Thousand Dollars ($25,000) for the services of the said Harold Hecht and for Producer's so-called overhead, and the compensation to be paid such other male star to appear in said photoplay shall be subject to the approval of Warner and, when so approved, shall be included by Producer as an item of direct cost of production of said photoplay. Except as specifically provided for above, Producer shall not be entitled to charge any so-called overhead to the direct cost, or otherwise, of the photoplay produced hereunder. The Producer agrees that when said budget is submitted to Warner, as herein provided for, the total direct cost of said photoplay, as set forth in said budget,

Plaintiff's Exhibit No. 7—(Continued)

shall not exceed the sum of One Million One Hundred Thousand Dollars ($100,100,000). Should said budget, when submitted to Warner by Producer, exceed the aforesaid sum with respect to the direct cost thereof, the Producer agrees, in the absence of Producer's securing Warner's written approval of any excess sum, to make such changes and revisions in the screen play contemplated to be used for said photoplay so that the budget of said photoplay shall, with respect to the total direct cost of production thereof, not exceed the limitation of direct cost aforesaid.

It is agreed that should the Producer, prior to the time that production of said photoplay is completed, expend in excess of the budgeted direct cost of production thereof, then and in that event it is agreed that Warner shall advance such additional sum, by way of credits or studio facilities, as is required to complete the production of said photoplay. It is further agreed, however, that should Producer, prior to the time that production of said photoplay is completed, expend more than fifteen per cent (15%) in excess of the budgeted direct cost of said photoplay, then and in that event Warner shall forthwith have full right or option to elect whether Warner shall assume control of production of said photoplay in place and instead of the Producer or whether Producer shall retain its control of production thereof. No such assumption of control of production by Warner under the provisions of this paragraph 7 or under the pro-

Plaintiff's Exhibit No. 7—(Continued)

visions of paragraph 12 hereof shall allow the Producer to permit any of its employees then assigned to said photoplay to discontinue the rendition of their services in connection with the production thereof until completion of their services in said photoplay, unless consented to by Warner. No such assumption of control of production by Warner shall in any way permit Warner to abrogate any contract entered into between the Producer and any of its employees engaged in the production of said photoplay or to replace any of such employees so long as said employees shall not be in default under the terms of their employment with Producer. In the event Warner furnishes additional financing and/or facilities to complete the production of said photoplay as above referred to, and whether or not Warner exercises its right to assume production control, as aforesaid, all such additional financing and facilities furnished by Warner shall be deemed financing and advances made by Warner within the purview of subdivision (V) of paragraph 11 (a) hereof and shall be recouped by Warner from the gross receipts of said photoplay, as in said paragraph 11 (a) hereof provided for. In no event shall the Producer be deemed to have breached this agreement nor to have prejudiced its interests in the proceeds derived from the photoplay hereunder, as provided for in subdivision (i) of paragraph 11 hereof, in the event it shall have expended in excess of the total budgeted direct cost of the photoplay to be produced

Plaintiff's Exhibit No. 7—(Continued)

hereunder, regardless of the amount of such excess.

It is agreed that when Warner's overhead charge to the direct cost of said photoplay, as hereinafter in the next succeeding paragraph hereof provided for, shall have been finally determined, Warner shall deduct therefrom, and shall not be permitted to recoup from the gross receipts of said photoplay under the provisions of paragraph 11 hereof, a sum equivalent to Fifty Thousand Dollars ($50,000) of its said overhead charge, and the term "cost of production", as referred to in sub-paragraph (II) of subdivision (b) of paragraph 11 hereof shall only be deemed to include the general overhead charge made by Warner to the direct cost of said photoplay reduced by said sum of Fifty Thousand Dollars ($50,000).

It is further agreed that, when the total direct cost of producing said photoplay has been finally determined, Warner shall be entitled to charge thereto, for facilities furnished Producer hereunder and not included in the direct cost of said photoplay, that proportionate share of the general overhead of Warner's Production Department attributable to said photoplay, in accordance with Warner's accounting system and practice from time to time established for and at the studio of Warner; provided, however, that the proportionate share of the general overhead shall not be computed on the basis of the direct cost of said photoplay but on the basis of the direct cost of said photoplay plus Fifty Thousand Dollars ($50,000) (it being agreed

Plaintiff's Exhibit No. 7—(Continued)

in this connection that while said sum of $50,000 shall be added for the purpose of computing the proportionate share of the general overhead, nothing contained in this agreement shall entitle Warner to recoup said sum of $50,000 as part of the cost of production). It is understood that, under the system of accounting above mentioned, part of such general overhead is proportionately charged against each photoplay on the basis of the actual or direct cost of producing such photoplay in relation to the total actual or direct cost of producing all photoplays of the same type and class produced during the same fiscal period to which overhead is charged. As an example, if the actual or direct cost of production of said photoplay is one-tenth (1/10th) of the actual or direct cost of producing all photoplays produced during the same fiscal period, then one-tenth (1/10th) of such overhead shall be charged to the photoplay produced hereunder. Except as hereinabove in this paragraph 7 referred to, no charge shall be included in said budget which shall constitute a so-called overhead charge on the part of Producer. Warner further agrees that the method and basis of its general overhead charge to the photoplay produced hereunder and, as well, the items, services or facilities included in said overhead, as aforesaid, shall not be changed with respect to the photoplay produced hereunder. Producer further agrees to make every effort possible, in connection with the writing and development of the screen play to be used as the basis of said photoplay, so that said screen play, when fully

Plaintiff's Exhibit No. 7—(Continued)

and finally written and prepared, shall not exceed one hundred thirty (130) pages in length, and that the principal photography of said photoplay, including all montages and/or so-called process shots, shall not require more than a period of fifty-five (55) production days.

Notwithstanding anything elsewhere to the contrary in this agreement set forth, it is understood that Producer shall not be deemed in default hereunder should Producer be unable to produce and deliver, or to commence the production of, the photoplay contemplated hereunder, as in paragraph 3 hereof referred to, in the event production of said photoplay is delayed due to events beyond the control of Producer, such as, but not limited to, delays resulting from the happening of any fire, casualty, strike, unavoidable accident, act of God, war or epidemic, the illness of any principal member of the cast of said photoplay, or the enactment of any municipal, county, state or federal ordinance or law, or the issuance of any executive or judicial order, whether municipal, county, state or federal, or by any other legally constituted authority which will prevent or materially hamper performance by Producer, or any other cause beyond the control of Producer. Moreover, it is agreed that Warner shall not be deemed in default hereunder or have any liability to Producer in the event Warner is unable to furnish Producer with facilities, as herein referred to, or is prevented from so doing due to the happening of any of the foregoing events or for other causes beyond the control of Warner.

Plaintiff's Exhibit No. 7—(Continued)

8. It is agreed that the photoplay to be produced hereunder will be produced using the so-called Technicolor process. Accordingly, it is agreed that, when production of said photoplay is completed, the Producer shall deliver to Technicolor Motion Picture Corporation the negative of said photoplay and, as well, a final cut positive print thereof, including the sound track thereof, fully cut, titled, edited and scored, and all other component parts of said photoplay necessary for the purpose of obtaining therefrom positive prints for the purpose of distributing, exhibiting and exploiting said photoplay. The Producer further agrees, at the time of its delivery of the negative of said photoplay, as aforesaid, to deliver to Technicolor Motion Picture Corporation the negative of a trailer made by Producer and a final cut positive print of said trailer, including the necessary and required sound track thereof and narration thereof, if any, fully cut, titled, edited and scored, for the purpose of obtaining therefrom positive prints for the purpose of advertising and exploiting said photoplay. The cost of said trailer shall be paid for by Producer and shall be included in the direct cost of production of the photoplay produced hereunder.

The Producer further agrees that, during the production of said photoplay and immediately thereafter, it will take such number of "still photographs" of scenes from, and the cast of, the photoplay hereunder as are normally and reasonably

Plaintiff's Exhibit No. 7—(Continued)

required for advertising and exploitation purposes, such stills to be publicity, scene, production, gallery, informal and news stills. Producer agrees to deliver the negatives and not less than six (6) positive prints of such photographs to Warner. Each photograph shall bear an appropriate title identifying it with the subject depicted. The cost of such photographs shall be paid by Producer and shall be included as a part of the direct cost of producing said photoplay. Any and all approvals that may be required in connection with Warner's and/or Distributor's use of said photographs will be secured by Producer and delivered to Warner at the time Producer delivers said photographs to Warner.

9. Warner agrees, from the commencement of production of said photoplay and thereafter for such time as is customary in the motion picture industry, to keep and maintain the negative of said photoplay and trailer, and positive prints and sound track thereof, insured in an adequate amount against fire, theft and other insurable risks, with the loss, if any, payable to Producer and Warner, as their respective interest may appear. The insurance to be secured and maintained by Warner, as aforesaid, shall be of such type and in such amount and at such rates as customarily secured in the motion picture industry by producers producing motion pictures of the type and quality of, and under circumstances and conditions substantially similar to those herein provided for the pro-

Plaintiff's Exhibit No. 7—(Continued)

duction of, the photoplay contemplated hereunder. The cost of such insurance carried by Warner shall be deemed a direct distribution expense and shall be recouped in the same manner as other distribution fees and distribution expenses hereinafter in subdivision (a) of paragraph 11 provided for.

It is agreed, however, notwithstanding anything to the contrary above in this paragraph 9 set forth, that should there be any recovery on any aforesaid insurance policy issued on the negative of said photoplay or on any property thereof in connection with a loss which occurs prior to the completion of the production of said photoplay, the amount of such recovery shall be available for use in connection with the production of said photoplay.

10. Producer hereby grants to Warner, and Warner shall have and retain, during the period of distribution hereinafter referred to, the sole and exclusive right or license in all parts of the world to distribute, exhibit, advertise, publicize and exploit, and to license others to distribute, exhibit, advertise, publicize and exploit, the photoplay produced hereunder, reissues thereof and trailers thereof by any and all media now or hereafter known and in every manner whatsoever, including, but not limiting the generality of the foregoing, all possible rights with reference to the screen, stage, radio, television, book, story publishing, and all other rights of every kind whatsoever. Warner may exercise such rights itself, or by or through its subsidiaries or such other distributor or dis-

Plaintiff's Exhibit No. 7—(Continued)

tributors (all hereinafter for convenience' sake sometimes referred to as "Distributor"), as Warner may select. Warner and/or the Distributor shall have the right, during the period of distribution hereinafter referred to, to release, and reissue and rerelease, said photoplay and trailer thereof in each country and territory of the world upon such dates as they consider advisable or desirable, as well as complete authority to distribute said photoplay and license the exhibition thereof in accordance with such sales methods, policies and terms as are current in their own business during the period of distribution of said photoplay, or in accordance with such sales methods, policies and terms as they may consider sound or desirable in their discretion.

It is agreed that the period of time during which Warner shall have the sole and exclusive right or license, in all parts of the world, to distribute, exhibit, advertise, publicize and exploit the photoplay produced hereunder, reissues thereof and trailers thereof, and license others to distribute, exhibit, advertise, publicize and exploit said photoplay, reissues thereof and trailers thereof, shall be for the period commencing with the date hereof and ending fifteen (15) years from the date of the first general release in the United States of said photoplay.

Without limiting the generality of the foregoing, Warner and/or the Distributor shall have the right to modify, amend, cancel, adjust and alter all agreements, exhibition licenses, sales methods and policies relative to the distribution, exhibition and

Plaintiff's Exhibit No. 7—(Continued)

exploitation of said photoplay as they may deem proper or advisable; to adjust and increase or decrease the amount of any allowances to any exhibitors for advertising and exploitation whether or not included in any theretofore existing agreement or license; to license the distribution and exhibition of said photoplay upon percentage rentals or flat rentals or both and in block with other photoplays or separately as they shall deem proper or desirable, and in the event that Warner shall decide to reissue said photoplay, it shall have the right to reimburse itself for all expenses incurred in connection with the said reissues, and to account for the net proceeds thereof in the same manner and with the same deductions and charges as for the original issue thereof.

The parties hereto recognize that in certain countries and territories Warner or Distributor now license the exhibition of their photoplays on a basis whereby the licensees pay a total license fee for the right to exhibit photoplays, together with advertising accessories to be used in connection therewith, and such licenses do not specify what part of the total license fee is being paid for such advertising accessories. Consequently, it is agreed that Warner or the Distributor shall have the right to license the exhibition of said photoplay in such manner and the further right to allocate to the said advertising accessories the actual cost of said advertising accessories. The Producer shall have no interest whatsoever in the proceeds derived from the

Plaintiff's Exhibit No. 7—(Continued)

sale or license or other distribution of so-called advertising accessories in any part of the world, and the total proceeds therefrom shall at all times belong to Warner or the Distributor.

Said photoplay shall be distributed in the United States and Canada and in such other territories and countries throughout the world as may be consistent with sound business policies of Warner and/or Distributor, and subject to the judgment of Warner and/or Distributor as to the likelihood that said photoplay can be profitably distributed in any country or territory; it being understood that in various countries and territories it may be inadvisable or may seem unprofitable to distribute said photoplay or to continue the distribution thereof after it has begun, and, therefore, Warner and/or Distributor, because of their experience and knowledge of the conditions in, and requirements of, the various countries and territories of the world, are hereby vested by the Producer with the absolute right, in its or their uncontrolled discretion, to determine in which countries and territories said photoplay shall be distributed, and in which countries and territories the distribution thereof may be discontinued after it has commenced. However, should Warner, in the exercise of the discretion in this paragraph given to it, not release the photoplay produced hereunder in any country other than the United States and Canada within a period of three (3) years following the first general release date of said photoplay in the United States or if,

Plaintiff's Exhibit No. 7—(Continued)

during said three (3) year period, Warner and/or Distributor has not actually contracted for the exhibition of said photoplay in any such other country, then Producer may negotiate an agreement with others to distribute said photoplay in said other country or territory, and Warner will execute a distribution agreement with said other party for such country or territory upon the customary terms in the motion picture industry; provided, however, that Warner shall not be required to advance dollars or any other currency to such other party for negatives, positive prints, accessories, or for any other purpose, and further, that the entire net proceeds of such license or distribution agreement shall be payable to Warner from which Warner shall deduct and keep, as its own, a sum equivalent to fifteen per cent (15%) thereof as reimbursement for costs and expenses incurred by Warner in connection with any such distribution agreement, and the balance remaining of such proceeds shall be applied in the manner in this agreement provided for.

Warner and/or the Distributor may grant to distributors who are not subsidiaries or affiliates of Warner, in countries other than the United States and Canada, the right to distribute said photoplay for either a flat sum or license fee or for a part of the receipts derived by such other distributors from the distribution of said photoplay, or a combination of both; and in such event, with respect to such territories, the rights to which have been granted

Plaintiff's Exhibit No. 7—(Continued)

to other distributors, only the net sums actually received by Warner or the Distributor in the United States in U. S. dollars from such other distributors shall be considered as a part of the gross receipts hereunder, and not the sums received by such other distributors from licensing the exhibition of said photoplay in theatres or other places of exhibition. Moreover, it is agreed that when Warner and/or Distributor grants to distributors, who are not subsidiaries or affiliates of Warner, in countries other than the United States and Canada, the right to distribute said photoplay, Warner and/or Distributor shall not be entitled to deduct, as a distribution fee from the net sums actually received by Warner and/or Distributor in the United States in U. S. dollars from such other distributors, a sum in excess of fifteen per cent (15%) of the net sums actually received by Warner and/or Distributor from any such transaction. It is further agreed that Warner and/or Distributor shall only be entitled to license the distribution and/or exhibition of the photoplay produced hereunder to such non-subsidiaries and/or non-affiliates, as aforesaid, upon the condition that it so licenses (during the period when the photoplay produced hereunder is being distributed) the distribution and/or exhibition of substantially all photoplays produced by Warner of comparable cost and quality. Also, nothing in this paragraph contained shall be interpreted or construed to mean that Warner and/or Distributor shall be entitled to make or deduct a double

Plaintiff's Exhibit No. 7—(Continued)

distribution fee with respect to such non-subsidiary or non-affiliate distribution license.

11. (a) Out of all of the "gross receipts" (as hereinafter defined) derived from said photoplay, Warner or the Distributor shall retain the sums hereinafter set forth in this subdivision (a), and the balance of the said gross receipts remaining after such sums have been first deducted shall be apportioned and paid as hereinafter provided. The sums to be so first deducted and retained by Warner from said gross receipts are the following:

(I) 27½% of the gross receipts of said photoplay received and collected by Warner or the Distributor from all sources in the United States of America (including Alaska and Hawaii) and Canada (including Newfoundland).

(II) 32½% of the sums received and collected by Warner and/or Distributor for granting to theatres located in the United Kingdom of Great Britain and Northern Ireland, the Isle of Man, the Channel Islands and Eire licenses to exhibit said photoplay.

(III) That percentage of the gross receipts of said photoplay from all sources set after the name of each country or territory in Schedule A hereto attached and hereby made a part hereof, and for all other countries and territories not specified in subdivision (I) and (II) hereinabove and in said Schedule A attached hereto, 32½% of the gross receipts of the said photoplay received and collected by Warner or the Distributor; except that

Plaintiff's Exhibit No. 7—(Continued)

the net sums in U. S. dollars actually received by Warner or the Distributor in the United States from non-affiliated and/or non-subsidiary distributors in territories and countries outside of the United States and Canada shall be considered as gross receipts.

(IV) The cost and expense of all negative and positive prints obtained for use in connection with said photoplay and trailer thereof, throughout the world, including cans, containers, packing and shipping, and all other expenses connected therewith; and Warner and/or the Distributor may manufacture or purchase as many negatives and positive prints, together with the other items listed in this sub-paragraph for use in connection with the said photoplay as it, in its discretion, may consider advisable or desirable.

(V) That part or portion of the "cost of production" (as hereinafter defined) advanced or provided by Warner by way of cash, studio facilities or credits, as in this agreement provided for, together with 4% interest thereon, as referred to in paragraph 2 hereof. No interest charge shall be made on the amount of Warner's overhead charge provided for in paragraph 7 hereof.

(VI) The amount of the loan, together with 4% interest thereon, made by Warner to Producer as provided for in paragraph 2 hereof.

(VII) All costs of advertising, publicizing and exploiting said photoplay by such means and to such extent as Warner or Distributor may, in its

Plaintiff's Exhibit No. 7—(Continued)

uncontrolled discretion, deem desirable, including, but without limiting the generality of the foregoing, so-called "cooperative advertising", or other advertising engaged in as a joint undertaking with exhibitors whereby the distributor agrees to pay or is charged with a portion of the exhibitor's advertising. Where said photoplay is advertised with a group of other photoplays not produced under this agreement, Warner or Distributor may apportion the cost thereof to the photoplay produced hereunder on the basis of the space used for said photoplay, compared with the total space used, and for the position, prominence and emphasis given said photoplay in relation to other photoplays included in such space.

(VIII) All cost of preparing and delivering said photoplay for distribution in all parts of the world, including, but without limiting the generality of the foregoing, editing, titling, superimposing, dubbing and duping of negatives and positive prints for foreign use; all duties, import tariffs, cost of exchange transactions, censorship fees and other costs; license fees, taxes and other governmental impositions and fees of every nature which may be assessed against said photoplay, or the proceeds thereof, or against a group of photoplays, or the proceeds thereof, in which said photoplay may be included, except income, franchise and similar taxes assessed against the Distributor for the privilege of doing business; all expenses incurred in revising or adapting said photoplay to meet censorship or

Plaintiff's Exhibit No. 7—(Continued)

other requirements in all countries, regardless of whether such revision or modification produces the desired result; all expenses incurred in the delivery of negatives and prints to all foreign countries.

(IX) The cost of checking attendance and receipts at any and all theatres where said photoplay may be exhibited on the basis of a percentage of the box office receipts.

(X) Royalties, if any, payable to manufacturers of sound recording and reproducing equipment and for the use of stories and music; copyrighting expenses and any and all other expenses in addition to those referred to herein, incurred by Warner or the Distributor in connection with licensing said photoplay for exhibition or for other uses of the photoplay and the story and music thereof; and dues or assessments to the Motion Picture Producers Association, or other associations or bodies.

(XI) All costs arising out of, and losses incurred as a result of, "quota" requirements or laws which may exist in any foreign country and costs arising out of losses incurred in the production and distribution of said photoplay made in any foreign country where Warner or the Distributor, as a matter of policy, considers that it can more profitably distribute American made photoplays distributed by it if, at the same time, it distributes photoplays produced in the country in which it is operating. The losses so incurred shall be determined in the same manner as such losses or costs are determined in such country with respect to photoplays pro-

Plaintiff's Exhibit No. 7—(Continued)

duced by Warner and distributed in such country during the same period of time that the photoplay produced hereunder is distributed in such country.

(XII) Any and all reasonable and proper expenses not hereinbefore provided for and incurred by Warner or the Distributor in exploiting and turning to account the said photoplay; provided, however, that Warner or the Distributor shall not include the cost of the general services and the general facilities of the offices and personnel used in the distribution of said photoplay, but only facilities and personnel acquired specifically, or used exclusively, for the distribution of said photoplay (for an appreciable period of time) shall be charged hereunder in addition to the distribution fees and other charges provided for under subparagraphs (I) to (XI), both inclusive, of this paragraph 11 (a).

(b) (I) The term "gross receipts" (as used herein) of the photoplay produced hereunder shall be deemed to be the actual receipts of Warner and/or Distributor from the distribution of said photoplay in the United States of America, its territories and possessions, together with the actual U. S. dollars received in the United States from all other countries and territories of the world, including Canada; together with the actual U. S. dollar receipts of Warner and/or the Distributor from trafficking in and exploiting said photoplay, including the net income from radio, television, 10mm. prints, trailers, commercial advertising tieups, and other forms

Plaintiff's Exhibit No. 7—(Continued)

of net income with respect to said photoplay, but excluding all income from lithographs and accessories. When any portion of foreign receipts shall be unremittable for any reason, such portion shall be disposed of as hereinafter in this agreement provided.

(II) The term "cost of production," as used in this agreement, shall be deemed to be not only the actual and direct cost of production of the photoplay produced hereunder in complete form, but also, in addition thereto, shall include the proportionate share of the general overhead of Warner's Production Department attributable (but which proportionate share of general overhead shall be computed not upon the basis of the direct cost of production but upon the basis of the direct cost of production plus $50,000, as provided in paragraph 7 hereof) to the photoplay produced hereunder, as provided for in paragraph 7 hereof, from which, however, shall be deducted $50,000.00, as also provided in said paragraph 7. The cost of producing a trailer for the photoplay produced hereunder shall be a part of, and shall be included in, the actual and direct cost of production of said photoplay. There shall not be included in "cost of production" any so-called overhead charge on the part of Producer, except as in paragraph 7 set forth.

The Producer agrees that, within three (3) months after the completion of photography of said photoplay, it will deliver to Warner a complete itemized statement of the actual or direct cost

Plaintiff's Exhibit No. 7—(Continued)

of production of said photoplay, and thereafter Warner shall add thereto such items of actual or direct costs as it may have provided in cash, credits or facilities, and which shall not have been included in the statement so supplied by Producer, together with its general overhead charges, as in paragraph 7 hereof provided for. Such itemized statement of the actual or direct cost of production so delivered to Warner by the Producer, plus the additional direct charges of Warner and its general overhead charges, shall constiute the "cost of production" of said photoplay.

(c) Under no circumstances shall the receipts of any theatre, or other user of the photoplay or rights connected therewith, be considered a part of the gross receipts of the photoplay produced hereunder. Only the license fee or rental paid by such user shall be included as a part of such gross receipts.

(d) No part of the sums received for licensing exhibition or other rights in connection with said photoplay outside of the United States shall be included as a part of the gross receipts unless and until such sums shall have been actually received by Warner or the Distributor in the United States of America in United States dollars. Warner or the Distributor will use reasonable efforts to convert foreign exchange into dollars, for the purposes of this agreement, at such rates of exchange as it may be reasonably able to obtain, regardless of whether such rates of exchange are official, unoffi-

Plaintiff's Exhibit No. 7—(Continued)

cial, or otherwise, and Warner shall not be responsible for any errors of judgment or otherwise in making any foreign exchange transactions at any time, but shall only be required to account, under this agreement for such dollars as it may actually obtain from transactions consummated by it. In the event that Warner or the Distributor cannot, because of laws or restrictions of the country in which such foreign currency is obtained, reasonably convert the same into United States dollars and transmit them into the United States, and in the event that such funds, had they otherwise been transmitted into the United States in United States dollars, would have become a part of the receipts payable to the Producer, then Warner agrees, at the written request of the Producer (provided it may legally do so, and subject to any and all limitations, restrictions, laws, rules and regulations which have been or may hereafter be enacted, adopted or prescribed by any foreign country), to deposit into a bank designated by the Producer, or pay to any other person or persons, such part of such foreign currency as would have been payable to the Producer hereunder. Such deposits or payments to or for the Producer shall constitute due remittance of such sums to the Producer, and Warner and the Distributor shall have no further interest therein or responsibility therefor.

(e) Warner or the Distributor shall have the unrestricted right to license said photoplay, or rights connected therewith, to any or all of the theatres

Plaintiff's Exhibit No. 7—(Continued)

or other agencies in which Warner may have an interest, directly or indirectly, upon such terms and rentals as Warner shall deem fair and proper under the circumstances, even though such rentals or terms shall be lower or less advantageous than the rentals or terms obtainable for similar uses at other theatres or agencies in which Warner has no interest, or which are competing with theatres or other agencies in which Warner itself has an interest. Warner agrees, however, that the terms upon which the theatres in which it has an interest shall be licensed to exhibit said photoplay shall be approximately the same terms upon which it licenses other photoplays of similar box office appeal to such theatres.

(f) In the event that in the United States or Canada any distributor shall rent any theatre for the purpose of giving exhibitions of said photoplay on a "road-show" basis, as such term is understood in the motion picture industry, then and in such event the net profits or losses derived by the distributor as a result of such "roadshow" exhibitions shall be included in or deducted from the gross receipts hereunder. In arriving at such net profits or losses, the distributor shall have the right to deduct all legitimate expenses in connection with such exhibition, including rent, advertising, cost of operating the theatre, and all other reasonable and customary expenses incurred in connection with such "road-show" exhibition.

(g) Warner agrees that the distributors shall,

Plaintiff's Exhibit No. 7—(Continued)

for a period of two (2) years from the general release of the photoplay produced hereunder, keep at their respective offices, throughout the world, complete books of account pertaining to the distribution of the photoplay produced hereunder by such offices, together with vouchers, records and accounts pertaining thereto, all of which shall be open, during reasonable business hours, for such two (2) year period, for inspection and copying by the Producer or its duly authorized agent, at the Producer's expense. The Producer may, under the same terms and conditions, and for the same period of time, also examine the general books of account, records and vouchers pertaining to the distribution of said photoplay which may be kept at Warner's home office in New York City. Notwithstanding the foregoing limitation of time, Warner agrees that Producer, at its sole cost and expense, shall have the right to examine all books and/or records pertaining to the distribution of the photoplay produced hereunder which may be kept and maintained by Warner and/or Distributors after the expiration of the aforesaid two (2) year period. Commencing sixty (60) days after the month of the general release of said photoplay, Warner shall render to the Producer summary statements of the receipts, expenditures and computations relating to said photoplay for the first calendar month of release and thereafter monthly, sixty (60) days after the end of each month, for the next succeeding eleven (11) months. For the

Plaintiff's Exhibit No. 7—(Continued)

next three years statements shall be rendered quarterly and thereafter semi-annually so long as said photoplay may be distributed hereunder, except that such statements for foreign business shall be rendered thirty (30) days later than the statements for the United States and Canada. Statements may be delayed because of war, delays in transportation, or for other reasons beyond Warner's control, and Warner shall not be deemed in default hereunder in the event it is unable to render such reports for any country within the time limits herein specified. Any sums shown to be due and payable to the Producer by such statements shall be remitted to Producer simultaneously with the rendering of such statements. All notices, statements and accounting which Warner is required or may desire to give Producer in connection with this agreement shall be sufficient if given by addressing the same to Producer at 4000 West Olive Ave., Burbank, California, or at such other place as may be designated in writing by the Producer. All notices which the Producer is required or may desire to give Warner under or in connection with this agreement with respect to the production of said photoplay shall be sufficient if given by addressing the same to Warner, in care of its Legal Department, at 4000 West Olive Ave., Burbank, California, or at such other place as may be designated in writing by Warner. All notices which the Producer may be required or may desire to give Warner under or in connection with this agreement with respect to

Plaintiff's Exhibit No. 7—(Continued)

the distribution and accounting of said photoplay shall be sufficient if given by addressing the same to Warner, in care of its Legal Department and a copy thereof to its Accounting Department, at its offices located at 321 West 44th Street, New York, N.Y., or at such other place as may be designated in writing by Warner.

(h) Warner or the Distributor shall have the full and complete right to release said photoplay upon such dates in such parts of the world as they deem desirable or advisable in their uncontrolled judgment and discretion; to license the distribution and/or exhibition of said photoplay, and in agreements licensing the said photoplay alone, or in agreements licensing said photoplay in block or together with other photoplays. It is understood by the parties hereto that in certain countries or territories Warner or the Distributor now license the distribution or exhibition of their photoplays on a basis whereby the licensee pays either a flat sum or percentage of the receipts, or both, for the right to exhibit a group of photoplays, and that such licenses do not specify what portion of such license payments shall be allocated to any one photoplay in such group; consequently, it is agreed that Warner or the Distributor shall have the right to license the distribution or exhibition of the photoplay produced hereunder in such manner, and in such event, Warner or the Distributor may, in its uncontrolled discretion, allocate to the photoplay produced hereunder such portion of said total li-

Plaintiff's Exhibit No. 7—(Continued)

cense payments as it may deem proper under the circumstances, Warner agreeing, however, that such allocation shall be fair under the circumstances.

Notwithstanding the foregoing provisions of this subdivision (h), Warner agrees, upon the condition that Warner and/or Distributor can obtain a sufficient number of release prints and subject to any and all lawful restrictions and/or prohibitions, that said photoplay will be released in the United States on or before the expiration of a period of twelve (12) months from and after the date of delivery thereof to Technicolor Motion Picture Corporation, as aforesaid.

(i) After making the deductions set forth in subdivision (a) of this paragraph 11, all gross receipts, as herein defined, then remaining shall be used and applied by Warner and/or Distributor as follows:

All gross reecipts then remaining shall be retained by Warner to the extent of fifty per cent (50%) thereof, and the remaining fifty per cent (50%) thereof shall be paid to the Producer at the time and in the manner herein provided. In all events, the payments and percentages provided for in this subdivision (i) shall be paid, retained or determined after all of the deductions in this agreement provided for shall have been first made from said gross receipts. Moreover, it is agreed that the photoplay to be produced hereunder shall in no way be considered, for the purpose of accounting the proceeds, if any, to Producer hereunder, a photoplay within the unit of three (3) photoplays to

Plaintiff's Exhibit No. 7—(Continued)

be produced by Producer pursuant to an agreement being entered into concurrently herewith by and between Producer and Warner, and all proceeds payable to Producer hereunder shall be paid Producer without regard to profit or loss to said unit of three (3) photoplays.

12. In the event that there shall be a substantial default on the part of the Producer hereunder with respect to any of its obligations in connection with the production of said photoplay, and which default can reasonably be cured by Producer within a period of ten (10) days from the date thereof, and should Producer not cure such default within a period of ten (10) days after written notice from Warner so to do, or should such default be of the type that cannot reasonably be cured by Producer within said ten (10) day period and Producer does not, in good faith, take active steps within said ten (10) day period to commence to cure such default, then, in either of said events, Warner may, at its option, cancel and terminate all of its obligations hereunder with respect to providing any further financing by cash advances and/or credits and/or by way of furnishing studio facilities to the Producer, or otherwise, in connection with the production of said photoplay, and, upon the exercise by Warner of such right or option, Warner shall have the further continuing right or option to itself produce or complete the production of said photoplay, using any facilities and/or financing it desires without restriction or hindrance from Producer, and if production of said photoplay be so

Plaintiff's Exhibit No. 7—(Continued)

completed and subsequently released by Warner, as in this agreement provided for, then all such advancements, financing, credits or studio facilities furnished by Warner to complete the production of said photoplay shall be deemed financing and advances made by Warner within the purview of subdivision (V) of paragraph 11 (a) hereof, and shall be recouped by Warner from the gross receipts of said photoplay as in said paragraph 11 (a) provided for.

13. Warner agrees to secure the copyright registrations of said photoplay and trailer thereof produced by Producer hereunder in the United States Copyright Office in the name of the Producer, and to advance the cost of such registration, and Warner may recoup such cost from the gross receipts of said photoplay pursuant to the provisions of subdivision (X) of paragraph 11 (a) hereof. It is agreed that the sole and exclusive right, title and interest in and to the copyright and renewal of copyright of said photoplay, the negative and positive prints thereof and trailer thereof, and all component parts thereof, except as herein provided for, shall, subject to Warner's and/or Distributor's exclusive right of distribution, exhibition and exploitation thereof and the liens and rights of Warner as in this agreement set forth, belong to the Producer. Warner further agrees that it will, upon the same terms and conditions aforesaid, duly procure copyrights for said photoplay and trailer thereof in the countries of North America, the

Plaintiff's Exhibit No. 7—(Continued)

United Kingdom of Great Britain and Ireland and the countries included in the so-called Berne Convention and in such other countries throughout the world where copyrights are procurable. Neither Warner nor Distributor shall have any liability whatsoever to the Producer or to any other person if any defect or defects exist in any such copyrights.

As security for the repayment by Producer to Warner of any and all sums advanced by way of cash and/or studio facilities by Warner or Distributor under this agreement, Producer does hereby mortgage, pledge and hypothecate said photoplay and all of Producer's right, title and interest therein and does hereby grant Warner and/or Distributor the first and continuing lien upon said photoplay and the related rights and properties, and upon all of the Producer's right, title and interest therein, and upon the copyrights of said photoplay and of all of the related rights and properties, and upon all negative and positive prints, trims and cutouts of said photoplay and the sound track thereof, and upon anything and everything tangible and intangible purchased or acquired for use in collection with, or used in connection with, the production of said photoplay, and upon all of the gross receipts derived from said photoplay, and upon all of Producer's rights under this agreement. If at any time Warner and/or Distributor shall deem it necessary or advisable that any further instrument or instruments be executed and

Plaintiff's Exhibit No. 7—(Continued)

delivered by Producer to establish more definitely or to evidence, maintain or defend any or all of the security rights or other rights given to Warner and/or Distributor as above set forth, Producer agrees from time to time, upon demand by Warner, to execute, acknowledge and deliver any such instrument or instruments in form satisfactory to Warner. In the event Warner is not repaid for all of its advances under this agreement, in accordance with the repayment provisions contained elsewhere in this agreement, then (in addition to any and all rights Warner or Distributor may have at law or in equity to enforce Producer's said obligation) Warner and/or Distributor shall have the right to foreclose the lien above mentioned in order to secure repayment of such advances.

The Producer understands that Warner has one or more music publishing houses affiliated with it or as subsidiaries, as the case may be, and, therefore, the Producer agrees that should any music or musical compositions be used in said photoplay, Warner, through such publishing affiliate or subsidiary as it may select, shall have, and is hereby given, the right or option to publish the same and to copyright any and all musical compositions in its own name or otherwise, as well as the right to sell copies, reproductions, recordings and transcriptions thereof, and to license others to use the same in public performances, radio broadcasting and/or otherwise as said publishing affiliate or subsidiary may in its uncontrolled discretion determine, and

Plaintiff's Exhibit No. 7—(Continued)

to reproduce the same, as aforesaid, on terms and conditions not less favorable than comparable and bona fide terms that may be offered by music publishing houses not affiliated with Warner, or which may be usual in the industry; and Warner's net receipts from such music publishers shall be considered gross receipts hereunder.

It is further agreed that Warner, in obtaining copyrights in said photoplay and trailer thereof in the name of Producer, as hereinabove provided, is authorized to have noted on such copyright registrations that the same are subject to the terms and provisions of this agreement.

14. It is agreed that said photoplay and the trailer thereof, or either thereof, may, when distributed to the general public, bear at the beginning of the main title of all positive prints thereof the phrase "Warner Bros. Pictures, Inc. Presents", or such variation thereof and in such manner of presentation as Warner may determine upon, with such trade-mark on the main title of each said positive print and at the end thereof as Warner may adopt and use from time to time. It is further agreed that, in the paid advertising and publicity issued by or under the control of Warner and/or Distributor, Warner and/or Distributor shall have the right or option to indicate therein with appropriate language that Warner or its subsidiary is the distributor of said photoplay and/or that said photoplay is being presented or distributed by or through Warner or its distributing affiliate, and

Plaintiff's Exhibit No. 7—(Continued)

to also place therein Warner's and/or Distributor's trade-mark as may be adopted and used from time to time.

15. The Producer shall use its best efforts to deliver to Warner, not later than thirty (30) days before the completion of principal photography of said photoplay, a complete statement containing the names of all persons to whom the Producer is required to give credit on the screen and in the paid advertising and paid publicity of said photoplay and the form and extent of such credit.

Warner agrees to comply with the provisions of any contracts of the Producer with writers, the director and principal members of the cast of said photoplay, and others, relating to the credit, and the form and extent of such credit, to be given them as evidenced by such statement; provided, however, Warner shall not be obligated to violate any agreement which it may have with any guild or association of employees in complying with the provisions of such statement. In this connection it is agreed that the credit to be accorded the Producer on the screen and in paid advertising and paid publicity of said photoplay shall be twenty-five per cent (25%) of the size type used to display the title of said photoplay. The credit to be accorded the supervisor of production of said photoplay on the screen and in paid advertising and paid publicity, as aforesaid, shall be given in the same manner, fashion and with the same prominence as that accorded by Warner to producers employed by it

Plaintiff's Exhibit No. 7—(Continued)

and who are assigned to produce photoplays of comparable style, class and box office appeal as the photoplay produced hereunder. It is further agreed that no credit shall be accorded the supervisor of production of the photoplay produced hereunder in so-called "teaser" and/or special advertising, publicity and exploitation thereof, nor in any so-called "trailer" or other advertising on the screen in connection therewith.

If Warner shall comply with the statement given Warner by Producer as above provided for, and if any person claims that Warner should give him credit in connection with said photoplay or that Warner should cease to give him credit in connection therewith, Warner will notify the Producer in writing or by telegram of such demand. The Producer, within twenty-four (24) hours after the receipt of such notice, will notify Warner that it does or does not consent that Warner comply with the demand of such person. In the event the Producer consents that Warner comply with such demand, Warner will thereafter accord or refuse to accord, as the case may be, such credit in accordance with such demand. In this connection, Warner will recoup all expenses incurred in complying with such demand from any moneys otherwise payable to the Producer pursuant to this agreement. If, however, Warner shall have failed to comply with the statement of credits given Warner by the Producer as aforesaid, then any expenses to which Warner is put in according or deleting credit, as

Plaintiff's Exhibit No. 7—(Continued)

the case may be, shall be at Warner's sole cost and expense.

Producer further agrees that Warner and/or Distributor may, consistent with Producer's contracts rights, use and display, and authorize others to use and display, the names, voices, and physical likenesses of the director and principal members of the cast of said photoplay in connection with the distribution, exhibition, advertising and exploitation thereof. Producer further agrees that, consistent with Producer's contract rights, Warner and/or Distributor shall have the sole and exclusive right, during the distribution period hereof, to broadcast, transmit and reproduce the sound synchronized with any said photoplay, or excerpts, summaries or dramatizations of such sound or of the literary material (including the basic story and/or screen play or parts thereof) upon which said photoplay is based, separately from the reproduction of said photoplay, including radio broadcasts with living actors and by so-called electrical transcriptions and/or by television for the purpose of advertising and exploiting said photoplay. Moreover, Warner and/or Distributor shall, consistent with Producer's contract rights, have the right to publish summaries of said basic story material and/or screen play and/or parts thereof upon which said photoplay is based up to 7500 words in length, for the purpose of advertising and exploiting said photoplay.

16. Warner and/or Distributor may recoup, from

Plaintiff's Exhibit No. 7—(Continued)

the gross receipts and proceeds of said photoplay, any expenses incurred by Warner and/or Distributor in any action or proceedings filed to recover moneys due pursuant to any agreement relating to the distribution or exhibition of said photoplay; provided, however, that such action or proceeding has been one which Warner or Distributor has filed believing, in good faith, that it would recover at least a substantial portion of such money. In this connection, it is agreed that only net collections of any such action or proceedings, after deducting expenses, shall be included in the gross receipts and proceeds of said photoplay.

17. Warner or Distributor, or their licensees, may re-cut and re-edit said photoplay for release in any territory in order to conform to the requirements of censorship authorities in any such territory and in order to conform to the peculiar racial or political prejudices likely to be encountered in said territory.

Warner and/or Distributor, without the consent of the Producer, may change the title of said photoplay in connection with its distribution in foreign countries, if, in the judgment of Warner and/or Distributor, it is necessary or expedient so to do.

Warner and/or Distributor may reimburse itself for the cost and expense of re-cutting, re-editing and title changes from the gross receipts and proceeds of said photoplay, as herein provided for.

18. Limited to the period of distribution re-

Plaintiff's Exhibit No. 7—(Continued)

ferred to in paragraph 10 hereof, Warner and/or Distributor may make or cause to be made, and/or authorize others to make, foreign language versions of said photoplay, including, but not limited to, dubbed versions, superimposed versions and synchronized versions, all without the consent of Producer. Warner and/or Distributor will advance, or obtain the advance of, any sums required in the making of such foreign versions and Warner or Distributor may reimburse itself for the cost of said versions from the gross receipts and proceeds of said photoplay pursuant to the provisions of subdivision (X) of paragraph 11 (a) hereof. Warner and/or Distributor may also grant to other persons the right to make foreign versions at the expense of the person making such versions and to distribute such foreign versions in specified foreign countries or territories, and the net percentages or net sums actually received by Warner and/or Distributor from persons making such foreign versions shall be deemed to be the gross receipts from such foreign countries or territories.

If any foreign versions are made, such foreign versions of said photoplay shall be deemed to be a part of said photoplay and shall be subject to the terms and conditions of this agreement.

19. Warner and/or Distributor may cause to be manufactured and distributed, in connection with the distribution and exhibition of said photoplay, advertising material (including lithographs, lobby displays and slides) such as is being used, and has

Plaintiff's Exhibit No. 7—(Continued)

customarily been used, by Warner or Distributor in connection with photoplays of like character and merit heretofore distributed by them. Warner and/or Distributor, however, shall not charge, against the gross receipts and proceeds from said photoplay, any sums expended for the manufacture and distribution of such advertising material, but either Warner or Distributor, or their assignees and licensees, shall defray the cost thereof. All sums of money received by Warner or Distributor from the sale or other disposition of such salable advertising material shall belong to Warner and/or Distributor and shall not be accounted for as part of the gross receipts and proceeds from said photoplay.

20. The gross receipts and proceeds from said photoplay shall be received by Warner or Distributor for the purposes of this agreement. Warner or Distributor shall not, however, be obligated to segregate the gross receipts from said photoplay from its other funds.

21. In the event of the merger or consolidation of Warner or Producer with any other corporation or corporations, or the sale by either party of a major portion of its assets or its business and good will, this agreement may be assigned or transferred to such successor in interest as an asset of the parties so assigning upon such assignee assuming the assignor's obligation hereunder.

22. Warner or Distributor may, in the name of the Producer or otherwise, take such steps as may

Plaintiff's Exhibit No. 7—(Continued)

seem appropriate to Warner or Distributor, by action at law or otherwise, to prevent any unauthorized exhibition or distribution of said photoplay or to precent any infringement of the photoplay, or the copyrights thereof, or to prevent any impairment of, encumbrances on, or any infringement upon, the rights of the Producer or Warner pursuant to this agreement. Warner or Distributor shall have the right, in the name of Producer or otherwise, to execute, acknowledge, verify and deliver all instruments pertaining to any action or special proceeding brought for any of said purposes.

All costs, expenses (including attorney's fees), loss, damage or liability suffered or incurred in connection with any such steps taken by Warner or Distributor shall be charged against the gross receipts and proceeds of said photoplay and shall be paid therefrom as a part of the expense of distributing said photoplay pursuant to subdivision (XII) of paragraph 11 (a) hereof, and any recovery, less costs and expenses thereof, shall be included in gross receipts; provided, however, Warner shall not be entitled to deduct any distribution fee in this agreement referred to from the amount of any recovery included in gross receipts, as herein referred to.

23. If a petition for involuntary bankruptcy shall be filed against the Producer and shall not be dismissed within thirty (30) days after the filing thereof, or if the Producer shall be adjudi-

Plaintiff's Exhibit No. 7—(Continued)

cated a bankruptcy on its voluntary petition; or if a receiver of the assets of the business of the Producer shall be appointed in any bankruptcy or equity proceeding and if any such receivership shall continue for more than ten (10) days; or if any attachment or execution shall be levied upon any negative, sound records or positive prints of said photoplay, or upon any property used or intended to be used therein or in connection with the production thereof, and shall remain in effect for more than ten (10) days; or if the Producer shall make a voluntary assignment for the benefit of its creditors; then such event shall, at Warner's option, be deemed to constitute an act of default by the Producer under the terms and conditions of this agreement, and such default shall be governed by the provisions of paragraph 12 hereof.

24. No waiver by either party hereto of any breach of any covenant of this agreement shall be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant or provision. The exercise of any option granted to either party hereunder shall not operate as a waiver of any default or breach on the part of the other party hereto. Each and all of the several rights, remedies and options of either party hereto under or contained in or by reason of this agreement shall be construed as cumulative and no one of them as exclusive of the others, or of any right or priority allowed by law. Any option or options or rights of election herein granted to either Warner or Pro-

Plaintiff's Exhibit No. 7—(Continued)

ducer may be exercised, unless herein otherwise specifically provided, by oral or written notice delivered by any means of communication whatsoever.

25. Subject to Producer's not desiring to keep and maintain a so-called film library, Producer hereby grants to Warner the right to use all cut-outs and trims and, as well, such portions as Warner may desire of the photoplay produced hereunder, as finally edited by Producer, for the purpose of making the same a part of Warner's film library and also the right to use and grant others the right to use the same in other photoplays; but nothing herein contained shall be deemed to mean that Producer grants Warner such rights with respect to such cut-outs, trims and portions of the photoplay produced hereunder involving persons, such as actors, actresses, directors and others, with respect to whom Producer does not have the right to grant such rights or prior to any time Producer shall have such rights. Warner shall not be obligated to pay Producer for any of the foregoing rights or to account to Producer for any rental value from the proceeds received by Warner from the exercise of any said rights.

26. This agreement shall be construed and interpreted pursuant to the laws of the State of California with respect to all matters relating to the production of said photoplay in the United States; and pursuant to the laws of the State of New York with respect to all matters relating to the distribution of said photoplay throughout the world.

Plaintiff's Exhibit No. 7—(Continued)

27. Nothing in this agreement contained shall be construed so as to require the commission of any act contrary to law, and wherever there is any conflict between any provision of this agreement and any material statute, law or ordinance contrary to which the parties hereto have no legal right to contract, the latter shall prevail, but in such event the provision of this agreement affected shall be curtailed and limited only to the extent necessary to bring it within the legal requirements.

28. Warner and/or Distributor may make such deductions, withholdings or payments from the gross receipts of said photoplay with respect to taxes and similar charges as they believe, in good faith, to be required by law, and if the Producer desires to contest any such tax or other charge it will do so directly with the governmental authority involved.

29. Nothing herein contained shall constitute a partnership between, or joint venture by, the parties hereto or constitute either party the agent of the other. Neither party shall hold itself out contrary to the terms of this paragraph and neither party shall become liable by any representation, act or omission of the other contrary to the provisions hereof. This agreement is not for the benefit of any third party and shall not be deemed to give any right or remedy to any such party, whether referred to herein or not.

30. Warner agrees, upon the expiration of the distribution period of the photoplay produced here-

Plaintiff's Exhibit No. 7—(Continued)

under and as referred to in paragraph 10 hereof, to deliver to the Producer the negative of said photoplay which is in its possession, and to also deliver to the Producer all positive prints thereof in its or its Distributor's possession, or, in lieu thereof, to furnish the Producer with evidence of the loss, obsolescence or destruction thereof. Warner will also deliver to the Producer any advertising material relating to said photoplay upon the condition that the Producer shall pay Warner the cost of any such advertising material. It is agreed that Warner shall be authorized to retain one (1) positive print of said photoplay for laboratory purposes. In this connection, it is agreed that, at the time of the delivery by Warner to Producer of the negative and positive prints and advertising material of said photoplay, it shall be optional with Warner as to whether or not the name of Warner, as well as any trade-mark or shield adopted and used thereon or therein by Warner, shall be continued to be used by Producer, Warner to make known its election to Producer in writing within fifteen (15) days after Producer has requested Warner in writing to make such election, and in this connection Producer agrees that it will, within fifteen (15) days after Producer's receipt of said negative and positive prints and advertising material, request Warner to make its election. After the expiration of the distribution period above referred to, Producer shall continue to be the owner of all rights in and to the photoplay hereunder and the story and/or

Plaintiff's Exhibit No. 7—(Continued)

literary property upon which it shall be based, and all other rights therein and thereto, without any interest of any nature whatsoever therein or thereto being claimed or asserted by Warner. Warner agrees to execute any and all documents which may be deemed reasonably necessary to effectuate the foregoing.

31. This agreement supersedes and cancels all other and former agreements and understandings in the premises between the parties hereto as of the date hereof.

32. It is specifically agreed that this contract contains all of the terms, conditions and promises of the parties hereto in the premises and that no modification or waiver thereof or of any provision thereof shall be valid or binding unless in writing executed by both parties hereto.

In witness whereof, the parties hereto have executed this agreement by their respective officers, hereunto duly authorized, the day and year first above written.

WARNER BROS. PICTURES, INC.

/s/ By C. H. WILDER,
Assistant Treasurer

NORMA PRODUCTIONS, INC.

/s/ By HAROLD HECHT,
Its President.

Schedule A

Australia and surrounding areas: 50%.

Mexico: 50%.

Plaintiff's Exhibit No. 7—(Continued)

New Zealand, Fiji and So. Pacific Isles: 50%.

Sweden: 40%.

Argentina and Paraguay 50%.

Brazil: 40%.

Chile: 45%.

Cuba: 45%.

Egypt, Syria, Palestine, Persia, Iraq, Anglo-Egyptian Sudan, Eritrea and Abyssinia, Cyprus: 35%.

Finland: 35%.

India, Burma, Ceylon and Afghanistan: 35%.

Panama and Canal Zone, Costa Rica, Guatemala, Nicaragua, Salvador, Honduras, and Br. Honduras: 35%.

Peru and Bolivia: 40%.

Puerto Rico and So. Domingo: 40%.

Trinidad and Tobago, Barbados, Br. and D. Guiana, Isle of St. Vincent, Antigua, Montsoret, Dominica, St. Kitts and St. Lucia: 40%.

Uruguay: 45%.

Switzerland: 40%.

Philippines: 35%.

Colombia: 40%.

Ecuador: 45%.

China: 50%.

Hong Kong: 35%.

Siam: 50%.

Singapore: 40%.

Belgium: 35%.

France: 45%.

South Africa: 35%.

Spain: 40%.

Plaintiff's Exhibit No. 7—(Continued)

"Exhibit No. 1"

[Printer's Note: Budget form not filled out.]

"Exhibit No. 2"

The undersigned, Norma Productions, Inc., hereby acknowledges receipt from Warner Bros. Pictures, Inc., in connection with the production of its photoplay tentatively entitled "The Hawk and the Arrow" the sum of.....Dollars ($.....) as a part of the loan agreed to be made the undersigned by the said Warner Bros. Pictures, Inc. in connection with the production of the aforesaid photoplay, pursuant to that certain agreement between the undersigned and the said Warner Bros. Pictures, Inc. dated..... The undersigned further acknowledges that the said Warner Bros. Pictures, Inc. is entitled to be repaid said sum of.....Dollars ($.....), together with interest thereon at the rate of four per cent (4%) per annum from the date hereof until paid, all in accordance with the terms and conditions in said agreement of.....set forth. The above referred to sum, together with interest thereon, shall be paid Warner Bros. Pictures, Inc. only from the proceeds of the photoplay produced under said agreement of....., and particularly as provided for in paragraph 11 thereof.

Dated this.....day of.....

Norma Productions, Inc.

By ....., Its

[Endorsed]: Marked for Ident. July 22, 1953.

PLAINTIFF'S EXHIBIT No. 8

[Letterhead of Morris L. Marcus]

Warner Brothers Pictures, Inc. Oct. 20, 1950
and Warner Brothers Studios
4000 West Olive, Burbank, California

Re: Jules Garrison vs. Warner Brothers Pictures, Inc. and Warner Brothers Studios, et al.

Dear Sirs:

In the above matter, I represent Mr. Jules Garrison who advises me that he has accepted your offer of $1,000,000 for proof and has given proof that Burt Lancaster did not do all of the stunts he is shown doing in the picture "The Flame and the Arrow". Mr. Garrison has already notified your company and also your attorneys of this fact.

Accordingly, I would appreciate your communicating with me on or before Tuesday, October 24, 1950 concerning payment of this claim.

Yours very truly,

MLM:f /s/ MORRIS L. MARCUS

[Penciled notation]: 10/26 I phoned Marcus—(1) no offer made; (2) Offer, if any, withdrawn; (3) Lancaster did the stunts.

[Endorsed]: Filed July 22, 1953.

PLAINTIFF'S EXHIBIT No. 9

AFFIDAVIT

County of Los Angeles,
State of California—ss.

The undersigned affiants, being duly sworn, depose and state:

That the affiants take this means of verifying that the stunts listed below were done by Burt Lancaster alone, without the aid of trick photography or trick means.

That the affiants are all recognized Hollywood stunt men employed in the production of motion pictures.

That the affiants realize that the public believes that stunt men and not the stars execute the stunts seen in motion pictures.

But, that the affiants were present at Warner Bros. studio on the set of "The Flame and the Arrow" at all times during the production of the Technicolor picture when Burt Lancaster personally performed the following stunts, which in the affiants' opinion have never been performed before by any star in any one picture:

(1) Executed somersaults and pirouettes from horizontal bar to horizontal bar (six in all) 20 feet above the ground, with swing up from one bar to the other, upstanding on one foot. From last bar he dropped ten feet to a balcony, where Nick Cravat approached with pole on which he slid to the ground for a grand finale.

(2) Climbed up a twenty-five foot pole balanced

Plaintiff's Exhibit No. 9—(Continued)

on the forehead of Nick Cravat, to finish off in a performance resembling a flag, and so-called, professionally, a "flag."

(3) From thirty-five feet in the air, walked across a pole in tight-wire fashion from ledge to ledge, with no net underneath.

(4) Climbed a thirty foot rope, hand over hand.

(5) Received Nick Cravat in his arms from high jump and tossed Cravat away in a somersault in swing time.

(6) Executed a "three men high" in the company of Nick Cravat and one, with finish off including a lean to ground, fall and then a roll over.

(7) Various and sundry riding and action stunts in battle scenes, and combat encounters, as well as hand to hand fight and sword duel with Robert Douglas.

/s/ Louis G. Tomei,
/s/ Sailor Billy Vincent,
/s/ Mickey McCardle,
/s/ Boyd Red Morgan,
/s/ Allen Wyatt,
/s/ Glenn Thompson,
/s/ Charles F. Horvath,
/s/ Paul Baxley,
/s/ Joe P. Smith,
/s/ Allen Pomeroy.

I, Allen Pomeroy, certify that the foregoing instrument was signed in my presence by each of the

Plaintiff's Exhibit No. 9—(Continued)

above signatories, and I further certify that such signatories are all known to me to be the persons whose names appear above.

/s/ ALLEN POMEROY

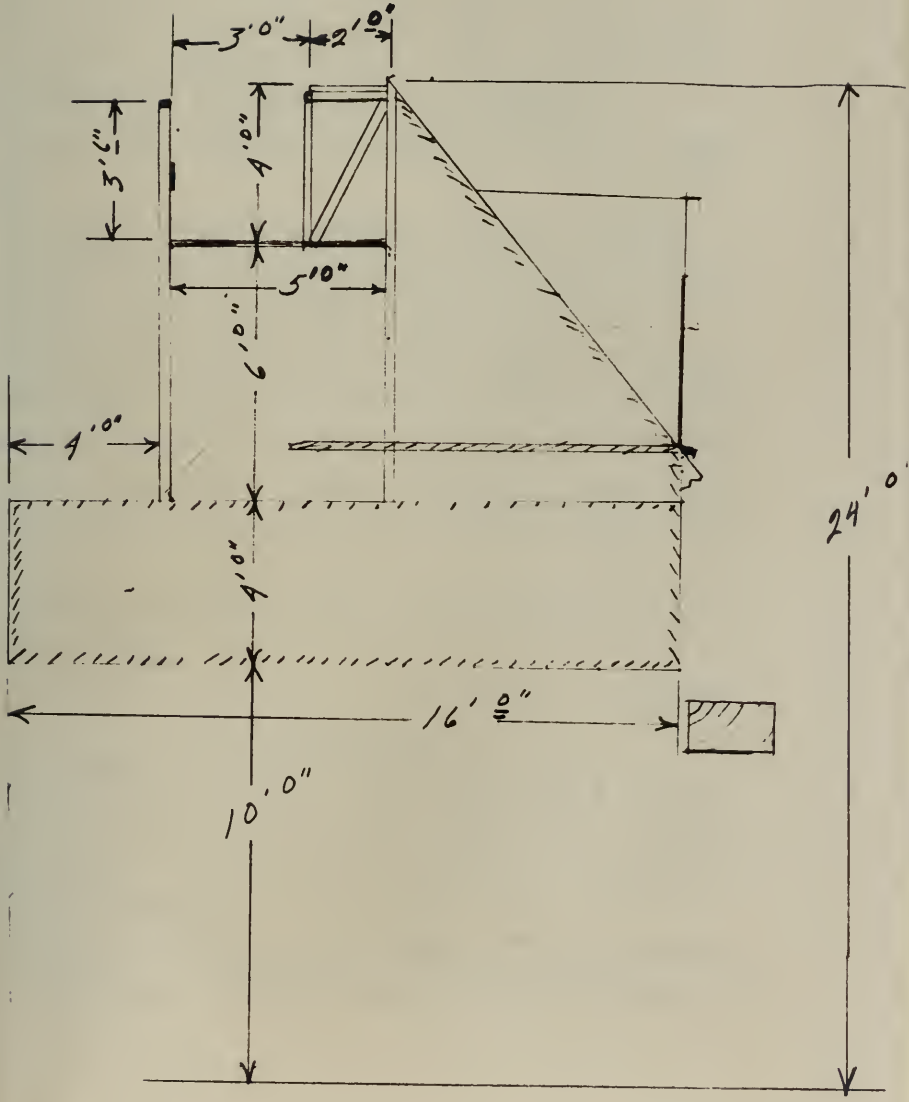
State of California,
County of Los Angeles—ss.

On this 24th day of February, 1950, before me, personally appeared Allen Pomeroy, to me known and known to me to be the person described in and who executed the foregoing certificate and acknowledged that he executed the same.

/s/ AUGUSTA I. WEISBERG,
Notary Public in and for said County and State.
My commission expires July 29, 1951.

[Endorsed]: Filed July 22, 1953.

No. 12479-Civ
Carrasco
vs.
Warner Bros
Defts EXHIBIT
No. A
Filed JUL 22 1953 19
EDMUND L. SMITH, Clerk
By M O'Smith
Deputy Clerk



DEFENDANTS' EXHIBIT "B"

Original Script from Studio

PATHE NEWS

Dope sheet from Cameraman: Vander Veer. Silent.

Subject: The producers of "The Flame and the Arrow" offer a reward of one million dollars to anyone who can prove that Burt Lancaster did not himself perform all the stunts attested to by the stunt men who worked in the picture.

Place: Los Angeles, California. Date: 11 July 1950.

Who else covered: Exclusive. Studio publicity.

Continuity is self-explanatory in rough-cut print; however, copy of shooting script is enclosed.

Burt Lancaster is counting one million dollars in closed vault. Counts to one million, taking last dollar from his pocket. Attendant opens door for three women reporters to enter. They interview Lancaster relative to offer of one million dollars (as above).

Sending rough-cut print and complete negative. 900 ft. Neg.

7/11/50

NEWSREEL

Close Shot. A Pile of Money. (Moving Camera). It is piled on the floor of a bank vault. Camera Pulls Back to reveal Burt Lancaster counting it, dollar by dollar.

Narrator's Voice (over above): The producers of "The Flame and the Arrow" offer a reward of

Defendants' Exhibit "B"—(Continued)

one million dollars to anyone who can prove that Burt Lancaster did not himself perform all the stunts attested to by the stunt men who worked in the picture.

Lancaster has reached the last of the huge pile of bills.

Burt: 999,998; 999,999—one million! (he wipes his brow) I had to count it three times to make sure.

Int. Bank Vault. Another Angle. As three girls enter—Kendis Rochlen, Maralyn Marsh, and Ann Helming:

Kendis: Mr. Lancaster, I'm Kendis Rochlen of the Los Angeles Mirror. Is this on the level?

Burt: It's so much on the level, I'm trying to figure out a way to win it myself.

Maralyn: Burt, I'm Maralyn Marsh of International News Service. I just saw "The Flame and the Arrow"—and you can't make me believe that was you doing those somersaults from six horizontal bars, fifty feet in the air!

Burt: Look, before I got lucky in Hollywood I made my living in a circus. I used to do that stuff for coffee and doughnuts.

Maralyn: What happened if you missed?

Burt (shrugging): Somebody got an extra doughnut.

Ann: Mr. Lancaster, I'm Ann Helming of The Hollywood Citizen News. It's hard to believe the producers want to give away a million dollars.

Burt: They really don't want to give it away.

Defendants' Exhibit "B"—(Continued)

But it's a bona fide offer. So if anybody wants it, they're going to have to fight for every dollar!

Ann: What if somebody proves it wasn't you, walking across a pole thirty-five feet in the air?

Burt: They'd get the million—and I'd go back to coffee and doughnuts.

Kendis (to the others): Come on, girls—let's run "The Flame and the Arrow" again!

[Endorsed]: Marked for Identification July 23, 1953.

DEFENDANTS' EXHIBIT "C"

WARNER PATHE NEWS

Used in Toto in L. A. Series 1949-1950

From issue No. 97 Los Angeles Local.

Film Producers Offer a Million Dollar Reward.

Camera: Vanderveer. Voice: Andre Baruch.

In Hollywood, Burt Lancaster counts the one million dollar reward offered by Warner Bros. to anyone who can prove that Burt himself didn't perform his daring stunts in "The Flame and the Arrow."

Burt Lancaster: "999,998; 999,999—one million dollars! I had to count it three times to make sure."

Girls: "Here he is, ladies."

Kendis: "Hello, Burt, I'm Kendis Rochlan of

Defendants' Exhibit "C"—(Continued)

the Los Angeles Mirror. Tell me, is this really on the level?"

Burt Lancaster: "Really on the level? Well, so much so I'm trying to figure out how to win it myself."

Maralyn: "Burt, I'm Maralyn Marsh of International News Service."

Burt Lancaster: "How do you do, Ma'm."

Maralyn: "I just saw you in "The Flame and The Arrow."

Burt Lancaster: "You did?"

Maralyn: "Now, look, you can't make me believe that was you doing those somersaults from, what was it, six horizontal bars, fifty feet in the air!"

Burt Lancaster: "Sixty feet in the air. Well, why not? Before I got lucky in Hollywood I used to make my living in a circus. Why, I did stuff like that for coffee and doughnuts."

Maralyn: "What happened if you missed?"

Burt Lancaster: "Somebody got an extra doughnut."

Ann: "Burt, I'm Ann Helning of the Hollywood Citizen News."

Burt Lancaster: "Well, hello."

Ann: "It's hard to believe the producers want to give away a million dollars."

Burt Lancaster: "Well, Ann, they really don't want to give it away if they can help it. But this is a genuine bona fide offer."

Ann: "What if somebody proves it wasn't you walking across a pole thirty-five feet in the air?"

Defendants' Exhibit "C"—(Continued)

Burt Lancaster: Well, if anybody can prove that they'll get the million. And I'll go back to coffee and doughnuts. Satisfied?"

Kendis: "Well, sounds good enough for me. Come on, girls, let's take a look at "The Flame and The Arrow" again."

[Endorsed]: Filed July 23, 1953.

[Endorsed]: No. 14316. United States Court of Appeals for the Ninth Circuit. Jules Garrison, Appellant, vs. Warner Brothers Pictures, Inc., a corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: April 19, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14316

JULES GARRISON,
Plaintiff and Appellant,

vs.

WARNER BROTHERS PICTURES, INC., a corporation, et al.,
Defendants and Appellees.

POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The appellant assigns the following as Points on which he intends to rely on appeal:

I.

The findings and conclusions of law and each of them are contrary to the law and the evidence.

II.

The decision and judgment of the United States District Court are contrary to the law and the evidence. An offer of reward was made and published throughout the nation, and accepted by the plaintiff. The plaintiff is entitled to the reward thus offered.

III.

The District Court erred in deciding and finding that, although an offer had been made by Warner Brothers Pictures, Inc. and in connection therewith an offer of $1,000,000.00 reward was offered

if it could be proved that the star in the picture did not perform all the stunts therein shown, the plaintiff was not entitled to the reward because it had been withdrawn prior to the acceptance thereof.

IV.

The District Court erred in finding that an offer of reward made publicly through the medium of motion pictures can be withdrawn in any manner and in any way other than in the same manner in which the offer was made. The evidence is that there was no such withdrawal.

V.

The District Court erred in deciding and finding that the acts of the hero in the picture (Burt Lancaster) which were not performed by him were not "stunts" within the meaning of the offer of reward.

VI.

The District Court erred in failing to make specific findings in accordance with the admitted and undisputed evidence, as follows:

(a) That the defendant Warner Brothers Pictures, Inc., a corporation, together with Norma Productions, Inc., a corporation, made the motion picture of "The Flame and the Arrow" under a contract, and after this motion picture was made it was distributed by Warner Brothers Pictures, Inc.

(b) That the defendant Warner Brothers Pictures, Inc., made a Newsreel offer, as part of its publicity campaign to distribute and sell the motion picture "The Flame and the Arrow", in which it offered a reward to the public generally, including the plaintiff, of $1,000,000.00 to anyone who could prove that Burt Lancaster did not do or perform all of the stunts he was shown doing in the new picture "The Flame and the Arrow."

(c) The District Court erred in failing to find that in the Newsreel offer of reward to the public generally, there were scenes taken in a bank vault in which Burt Lancaster and three newspaper reporters were shown in the presence of stacks of money, represented to be $1,000,000.00 in cash, and this newsreel had the following dialogue:

"In Hollywood, Burt Lancaster counts the One Million Dollar Reward offered by Warner Brothers to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in 'The Flame and the Arrow'."

(d) The District Court failed to find the undisputed fact that at about the time of the showing of the newsreel set out in the foregoing assignment, a news item appeared in the Los Angeles Daily Mirror, a newspaper of general circulation in Los Angeles County, which news item was based upon a press release issued by Warner Brothers Pictures, Inc. and was authorized, showing a picture of Burt Lancaster and the newspaper reporter, Kendis Rochlen, underneath which picture it was stated:

"$1,000,000 if you can prove Burt didn't do it.

"Things cannot be so bad in the movie business. Warner Brothers offered to give away $1,000,000 today. It is waiting in cash for anyone who can prove Burt Lancaster did not do all the stunts he is shown doing in a new picture. In "The Flame and The Arrow", apparently no drawing room drama, Lancaster performs somersaults from the horizontal bars, walks across a pole 35 feet above ground, and scales walls like a window washer gone beserk."

This this publication was made pursuant to press releases of Warner Brother Pictures, Inc. and never repudiated or withdrawn by them.

(e) That the District Court Erred in failing to find that the defendant Warner Brothers Pictures, Inc. did not repudiate or disavow or withdraw the same publication or announcement, nor its newsreel offer at the time the plaintiff accepted the same, nor did it ever publicly repudiate or withdraw the offer. That it was accepted by the plaintiff and proof offered by him, which was rejected by the defendant.

VII.

The District Court erred in finding, contrary to the evidence, that the plaintiff failed to accept the offer and failed to notify defendant Warner Brothers Pictures, Inc. and its attorneys of said acceptance, and failed to notify them of the facts constituting the acceptance.

VIII.

The District Court erred in Finding of Fact X that the activities therein described, performed by Don Turner, a Hollywood stunt man, for Burt Lancaster, did not constitute stunts. This is clearly against the weight of the evidence, and the further finding that said stunts were not daring or dangerous is against the weight of the evidence.

IX.

Errors of law occurred at the trial, namely:

(A) The ruling in substance by the Court that acts done by agent corporations of defendant were not done by defendant.

(B) The interpretation of the offer in a strained and unnatural manner against plaintiff, when the offer was prepared by defendant, and the plain, reasonable meaning as contended for by plaintiff would give it life. The construction urged by the defendant and adopted by the court was one in favor of the defendant and against the plaintiff and made it meaningless and a trick and snare.

X.

The violation of Rule 33 of the Federal Rules of Civil Procedure by defendant in giving false answers under oath to Interrogatories submitted to said defendant, namely to Interrogatories No. 10 and No. 11.

XI.

The violation of Rule 36 of the Federal Rules of Civil Procedure by defendant in giving false an-

swers to Request for Admissions, namely to Request No. 3.

XII.

The District Court erred in failing to grant plaintiff's motion for attorneys fees and expenses under Rule 37(c), which is designed to enforce the provisions of Rule 36. The rule is mandatory that a judge shall allow a reasonable fee to attorneys bringing the suit, where the defendant fails to respond fully and truthfully to request for admissions.

XIII.

The District Court erred in failing to grant plaintiff's attorneys reasonable compensation for 250 additional hours of time spent and $600.00 expense incurred by reason of the failure of the defendants to make admission and thus "to expedite the trial and relieve parties of the costs and labor of proving facts which would not be in dispute on the trial and the truth of which could be ascertained by reasonable inquiry.

Respectfully submitted,

/s/ MORRIS LAVINE,
Attorney for Plaintiff and
Appellant

The appellant designates the entire record and all exhibits as his record on appeal.

/s/ MORRIS LAVINE

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 18, 1954. Paul P O'Brien, Clerk.

No. 14316

United States Court of Appeals

For the Ninth Circuit

JULES GARRISON,
Appellant,

vs.

WARNER BROTHERS PICTURES, INC., a corporation,
Appellee.

Appeal from Judgment for Defendant and Order Denying Costs and Attorney's Fees Under Rule 37(c), F. R. C. P.

Opening Brief on Appeal

MORRIS LAVINE
215 West 7th Street
Los Angeles 14, California
Attorney for Appellant.

TOPICAL INDEX

Page

TABLE OF CASES AND AUTHORITIES CITED

Page

Codes, Statutes, etc.

United States Court of Appeals

For the Ninth Circuit

JULES GARRISON, *Appellant,* vs. WARNER BROTHERS PICTURES, INC., a corporation, *Appellee.*	No. 14316

Appeal from Judgment for Defendant and Order Denying Costs and Attorney's Fees Under Rule 37(c), F. R. C. P.

Opening Brief on Appeal

JURISDICTION

This is a diversity of citizenship case brought under Title 28, Section 1332 and 1391, U. S. Codes.

The plaintiff, a citizen of the County of Los Angeles, State of California, brought this action against Warner Brothers Pictures, Inc., a Delaware corporation, doing business at Los Angeles, California, State of California.

Appellate jurisdiction is had by reason of Section 1291, Title 28, U. S. Codes. Judgment was entered and

filed September 30th, 1953. (R. 48-49). A motion for attorney's fees, costs and expenses under Rule 37(c) for giving a false answer was denied. (R. 70).

A motion for a new trial was noticed on October 8th, 1953 (R. 49-50), which came on for hearing on Monday, November 30th, 1953, at 10:00 A. M. (R. 62). The said motion of plaintiff for a new trial came on for hearing on December 28th, 1953 (R. 69), and was denied. A notice of appeal was filed January 21st, 1954 (R. 70). This Opening Brief is filed within the time fixed by law and extensions thereof granted by a judge of the United States Court of Appeals.

STATEMENT OF THE CASE

This is a suit by the plaintiff, Jules Garrison, against Warner Brothers Pictures, Inc., for $1,000,000.00 for breach of contract. The breach grows out of an offer of the defendant studio made through its star in a picture called "The Flame and The Arrow", Burt Lancaster, to pay $1,000,000.00 to anyone who could prove that Burt Lancaster did not do all the stunts he is shown doing in a new picture (R. 305) and published at his instigation and the instigation of the studio on July 17th, 1950, in the Los Angeles Mirror, a daily newspaper of general circulation and a similar offer made in a Warner Bros. Newsreel "to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in "The Flame and The Arrow." (R. 313).

The offers were made by Warner Brothers through its star, Burt Lancaster, through its publicity department as a part of an advertising campaign to build Burt Lancaster into a star position similar to the type once held by Douglas Fairbanks—stated by Mr. Alex Evelove, a publicity agent for Warner Brothers Pictures Corporation, which he directed:

> **"We wanted to prove that perhaps not since Douglas Fairbanks had there been an actor who could do the acrobatic stunts that Mr. Lancaster can do and that was the whole purpose of the campaign."** (R. 98).
>
> **"Q. And that was to prove that he himself had done them rather than someone else, is that correct?**
>
> **"A. That is right. And the film was photographed, as I remember, so that the camera would be on Mr. Lancaster when he did the acrobatic stunts so that the publicity and the stunts and everything would jibe."** (R. 98).

Warner Brothers Pictures issued publicity releases for the picture through Mr. Evelove and sent them to the newspapers. (R. 93). They also arranged for a Warner Brothers newsreel to take the newsreel of Burt Lancaster (R. 101)—Warner-Pathe Newsreel is a wholly owned subsidiary of Warner Brothers Pictures, Inc. (R. 102). Mr. Evelove saw the newsreel after it was returned to Los Angeles and made no changes in it after it was sent out.

The picture, "The Flame and The Arrow", starring Burt Lancaster, was produced by Norma Produc-

tions, financed by Warner Brothers (R. 113), of which Mr. Lancaster was an officer. It was produced on the Warner Brothers' lot, using Warner Brothers' facilities, and financed by Warner Brothers under an agreement by which the picture would be distributed by Warner Brothers for a period of fifteen years and to collect all the money from distribution and after all those costs had been repaid, the balance, if any, would be divided between Norma Productions, Inc., and Warner Brothers Pictures, Inc. (R. 114)—Plaintiff's Exhibit No. 7, R. 314 (a typical producer-distributor contract). The publicity was one of the costs which was to be deducted and was to be handled through Warner Brothers' publicity department. (R. 115).

In furtherance of the program of building Burt Lancaster into a great athletic star, Warner Brothers' publicity department arranged for Burt Lancaster to go to the vault of the Bank of America and posed for a picture of publicity purporting to show $1,000,000.00 to be offered as a reward. (R. 121) (R. 305). And there he caused the offer to be publicized by the Los Angeles Mirror on July 17th, 1950. (R. 305). That offer was as follows:

> "THERE'S A $1,000,000 FOR YOU; JUST PROVE BURT DIDN'T DO IT
>
> "Things can't be so bad in the movie business. Warner Bros. offered to give away $1,000,000 today.
>
> "It's waiting in cash for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in a new picture.

"In 'The Flame and The Arrow,' apparently no drawing-room drama, Lancaster performs somersaults from horizontal bars, walks across a pole 35 feet above ground, and scales walls like a window washer gone berserk.

"Virginia Mayo costars with Lancaster in the film. Enough to make any man acrobatic."

The newsreel was also released, Plaintiff's Exhibit No. 6, which read as follows:

"ACTUAL NEWSREEL SCRIPT

"Annor.: In Hollywood, Burt Lancaster counts the one million dollar reward offered by Warner Bros. to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in 'The Flame and The Arrow.'

"Lancaster: 999,999,999,999, One million dollars. I had to count it three times to make sure.

"Girl: Here he is, ladies.

"Rocklin: Hello, Burt. I'm Miss Rocklin of the Los Angeles Mirror.

"Lancaster: How do you do?

"Rocklin: Tell me, is this really on the level?

"Lancaster: Really on the level? Well, so much so that I'm trying to figure how to win it myself.

"Marsh: Burt, I'm Marilyn Marsh of International News Service.

"Lancaster: How do you do, Ma'am?

"Marsh: I just saw you in 'The Flame and The Arrow.' Now look. You can't make me believe that it was you doing those somersaults from, what was it, six horizontal bars, 50 feet in the air?

"Lancaster: Sixty feet. Why not? Before I got lucky in Hollywood, I used to make my living in the circus. I did stuff like that for coffee and donuts.

"Marsh: What happened if you missed?

"Lancaster: Somebody got an extra donut.

"Helming: Burt, I'm Ann Helming of the Hollywood Citizen-News.

"Lancaster: Well, hello.

"Helming: It's hard to believe that any producer wants to give away a million dollars.

"Lancaster: Well, Ann, they really don't want to give away a million dollars if they can help it. But this is a genuine, bona fide offer.

"Helming: What if somebody proves that it wasn't you who walked across the pole 35 feet in the air?

"Lancaster: If anybody can prove that, they'll get the million dollars and I'll go back to coffee and donuts. Satisfied?

"Rocklin: Sounds good enough for me. Come on, girls, let's take another took at 'The Flame and The Arrow.' "

Plaintiff first saw the newsreel offer in July, 1950. (R. 142). He knew Don Turner, a stunt man, and had seen him around the studios. (R. 143). When he saw the picture, "The Flame and The Arrow", particularly as it related to playing the part of Dardo in the picture, he recognized Don Turner, and not Burt Lancaster, at the head of the band of horses in the courtyard where the big fight takes place and in the

rescue of Papa Pietro and in the roof stunt—going up on the roof. That was where the midget was carried on his shoulders up over the roofs, and there were other places. (R. 144). He also observed that in the fight sequences with relation to the duel between Allesandro and Dardo that it appeared to be Turner and not Lancaster. He telephoned the studio (R. 144-145), and they couldn't decide who to turn him over to, so they finally turned him over to Freston & Files, attorneys for Warner Brothers. He then talked to Mr. Gordon Files.

> "I said that I had seen the motion picture called The Flame and The Arrow or, rather, I had seen the offer in the newsreel wherein Burt Lancaster had, in behalf of Warner Bros., offered $1,000,000 to anyone who could prove that 'I do not do all of the stunts in the picture,' and I said that I felt sure I could prove it and told them that I had tried to get the award accepted publicly in some way but didn't do it so I was calling them up to let them know and they didn't want to give me the $1,000,000 and I told them I would go and get a lawyer and try to get it for myself. That was about the substance of it."

Having been rejected by Mr. Files, he then consulted Mr. Morris L. Marcus, an attorney, who then forwarded acceptance of the offer and a demand of the reward to Warner Brothers Pictures (R. 386).

On cross examination, Mr. Garrison testified that he had not only seen the newsreel, but he had seen the newspaper article in the Mirror (R. 150-151). He

stated that in his conversation with Mr. Files he could prove that Mr. Lancaster did not do all his own stunts and he would like the $1,000,000. Mr. Files stated he didn't know anything about it, (R. 151) and he went on to explain some of the stunts that he thought Mr. Lancaster didn't do. He might have mention Billie Curtis, the midget, and that Billie Curtis had admitted being carried up on the roof by *Don Turner* (R. 153), and he might have told Mr. Files that Alan Pomroy admitted to him that Don Turner did the stunt of climbing up on the roof (R. 153). He admitted that he said he would take less than $1,000,000 (R. 155) but did not mention the amount, and that he might have said that he wanted to go to New York for the current theatrical season and try to work there, and in order to accomplish that he needed a suit of clothes and transportation and some spending money (R. 155), and that something could be done for him without the necessity of his taking any action which would publicize the claim (R. 156).

Garrison and Files had some discussion about settling the matter without the possibility of his having to take any action to cause any publicity on the claim. He denied that Mr. Files told him that if any such offer had been made he wanted him to know it was withdrawn. Gordon Files, attorney for Warner Brothers, testified having three conversations with Garrison. In the first:

> "He then proceeded to tell me that he had learned of some advertising which had been put

out stating that Warner Bros. would pay a million dollars to anybody who could prove that Burt Lancaster had not done all of the stunts that were credited to him in the motion picture The Flame and The Arrow.

"I said something to the effect that I wasn't familiar with that, and Mr. Garrison then proceeded to tell me more.

"He said that he had worked on the picture as an extra; that he knew about this offer having been made, and that he believed that he could prove that Mr. Lancaster had not done certain of the stunts.

"The ones he referred to particularly, and that he mentioned in that phone conversation, were three. One was, he said, climbing up on to the rooftop with the little boy. Mr. Garrison said that was done by Don Turner and by Billie Curtis, a midget. He said he did not know whether he could get those people to testify for him or not, but that he knew that those people had done that, and that they would have to say that.

"The second thing he mentioned was horseback riding. He said he knew that Mr. Lancaster had not done some of the horseback riding and that the Hudkins brothers, who had furnished the horses would be willing to say that they helped Don Turner get on one of the horses for one of the sequences in the picture.

"He told me that he had talked to Alan Pomroy about this; that Alan Pomroy had admitted that it was Don Turner who had climbed up on the roof of the house and that he, Garrison, had a recording of his conversation with Mr. Pomroy.

"He said he knew that Don Turner's name had been mentioned on the call sheet out at the studio for certain days, indicating that Mr. Turner had worked on this picture.

"He said that we would probably find out in the wardrobe a duplicate Dardo costume which had been up for Don Turner." . . .

Mr. Files told him he didn't know anything about it, hadn't seen the picture and didn't know the circumstances. He said he got a second phone call from Mr. Garrison, at which time he told him that he had made an investigation and it was our understanding that Mr. Lancaster had performed all of his own stunts in the picture. (R. 191). He said that if he couldn't make any arrangements he was going to hire an attorney and that he would give him a week to think it over. On the second conversation, Mr. Files stated:

"Mr. Garrison or a person who introduced himself as Jules Garrison, and it was the same voice that I had talked to the first time, telephoned me at my office, got me on the phone and asked me what we had decided to do. I told him that I had made some investigations and it was our position that no offer had been made; that if he thought there had been any offer made it is withdrawn and he should consider it withdrawn. I told him further that I had made some investigation as to how the picture had been made and that it was our understanding that Mr. Lancaster had performed all of his own stunts in the picture.

"Mr. Garrison said he could prove the things that he had talked to me about in the previous con-

versation and that if he couldn't make an arrangement with us he was going to employ an attorney. He said that he would give us a week to think it over.

"I think again he mentioned that he would prefer to handle it directly and not have an attorney in on it. He said that if he didn't hear from us in a week he was going to go to an attorney." (R. 191-192).

A week later they received a letter from Mr. Marcus dated October 20th, and he had a phone call from Mr. Marcus. Mr. Files stated to Mr. Marcus:

"that we had received his letter dated October 20th, 1950; that our position was that Warner Bros. had made no offer; that if any offer should be deemed to have been made in the past, it had been revoked, and, furthermore, I told him that Mr. Garrison was mistaken as to the facts, that Mr. Lancaster had actually done all of his own stunts in the picture, The Flame and The Arrow." (R. 193).

Proof at Trial That Don Turner Did Stunts in Picture Doubling for Lancaster

In the trial it was conceded that Burt Lancaster was taken to Warner Brothers Newsreel under the direction of the publicity department for the newsreel offer.

DONALD TURNER, stunt man who does doubling and stunt work in the picture business (R. 164) testi-

fied that he had been engaged in that business for twenty years, and Turner testified as follows:

"Q. Do you recognize that picture that you saw here in court as being the same identical picture as the first one you saw?

A. I would say so, yes.

Q. Now, particularly directing your attention to the character Dardo, do you recall the sequence in it where Burt Lancaster, in the part of Dardo, shoots an arrow which purports to hit the falcon?

A. Yes.

Q. In the court yard?

A. Yes.

Q. And then shortly after that Ulrich tells the soldiers to seize the boy. Do you remember that sequence?

A. Yes.

Q. Now, there was a sequence immediately following that that shows Dardo running across the top of this peaked roof, shortly before the time that he is struck by an arrow. Who played the part of Dardo running across the roof with the boy in his arms in that sequence?

A. I doubled for Mr. Lancaster running across the roof.

Q. And that was you portrayed on the rooftop; is that correct?

A. Yes.

Q. With relation to the character Rudie, that is, the boy, do you remember who it was that you carried across the roof at that time?

A. Yes, I member.

Q. Who was it?

A. Billie Curtis.

Q. Is that Billie Curtis, the midget?

A. Yes, sir.

Q. Now, directing your attention to the sequence where the soldiers ride—or, not the soldiers, but the band rides into the court yard to rescue Papa Pietro with these sapling spears,—do you recall that?

A. Yes.

Q. All right. Now, in going into the court yard there with the spears, and in this hand-to-hand encountering, what character did you portray?

A. I doubled for Burt Lancaster in the part of Dardo.

Q. Then you were the character Dardo?

A. I rode into the square.

Q. And in the course of that sequence there, you engaged in some part in the fight with the soldiers, where you were using the sapling spears; is that correct?

A. Enough to bring the two factions together.

Q. And then in that following sequence, where the character Dardo jumps on to the oxcart and cuts Papa Pietro down, and drives the team out of the square, what part did you play in that sequence?

A. I doubled for Burt Lancaster.

Q. In the character of Dardo?

A. In the character of Dardo, and I drove one horse out, not a team.

Q. Now, getting along to the next sequence, and that is the one involving—do you recall near the end of the picture is where there is a sword fight between Alessandro and Dardo that occurs there at the time that Dardo kills Alessandro?

A. Yes.

Q. Now, that was the one that occurred in the castle shortly before the time that Ulrich was killed by the bow and arrow by Dardo; isn't that right?

A. Yes, I think so. Yes.

Q. Now, in that sword fight or duel, particularly as it related to the shots that were taken showing the two men dueling, where it was taken from the back of the character Dardo and showing the face view of Ulrich—I mean of Alessandro, were you playing the part of Dardo in that sequence at that time?

A. I think I worked in two shots that we saw in the picture.

Q. In that duel, with you back to the camera; is that correct?

A. That is correct.

Q. Were you there at the time that these purported arrow shots were made with relation to the piercing of the falcon, and the shooting of Ulrich?

A. I think I was on salary on the picture. I didn't actually see it being done.

Q. Now, with relation to these particular shots, let's take the roof shot, for example—

Mr. Williams: Just a minute. You used the word 'shot' in connection with the arrow, and now you are using the word 'shot' in another way.

Mr. Dryden: I will reframe it.

Q. (By Mr. Dryden): I am not speaking about shooting an arrow. You said you don't recall being there watching that scene?

A. No, I wasn't.

Q. In this situation where yau carried Billie Curtis across the roof, you were on stunt man's pay at that time, were you?

A. I am always on stunt man's pay, as you call it; that or a double's pay, at any time I work in the studio.

Q. Then, in addition to that, when you are working, if you do something such as a stunt, you will receive a pay adjustment; isn't that right?

A. You receive adjustments for your ability to save time, your knowledge as a person doing doubling work, and for additional—well, work, in any sense you might want to phrase it.

Q. With relation to the sequence of running across the roof with Billie Curtis, you did receive additional or adjustment pay of $145 approximately for that sequence; isn't that correct?

A. I received more money. I don't know what it was per day.

Q. In the sequence when you were engaged in the dueling, you received more money; isn't that correct?

A. I always do.

The Court: What do you mean, you always do?

The Witness: My salary is known through the studios for doing fencing, as above the minimum of $70 a day, and I get a minimum of $100 a day.

The Court: When you do fencing?

The Witness: When I do fencing, because there is an adjustment.

The Court: How about this roof incident? Did you get any extra pay for that?

The Witness: I did, yes, sir.

Q. (By Mr. Dryden): And with relation to the fight with the saplings when you came into the court yard and rescued Papa Pietro, you received extra pay for that, didn't you?

A. I did. (R. 164-168).

The trial court made Findings of Fact in which it set out that on or about July 17, 1950, the defendant, acting through its Studio Publicity Manager, cause Burt Lancaster to appear at the vault of the Los Angeles bank, where he was photographer by a motion picture camera and a newsreel sequence prepared showing said Burt Lancaster behind the bars in said bank vault in his shirt sleeves purporting to count money, to-wit, One million dollars. (R. 40).

But, in the said Findings, the Court finds that the language originally sent by the Publicity Department was re-edited by the film editors or script writers in the employ of Warner News, Inc., and put in the following words:

"In Hollywood Burt Lancaster counts the $1,000,000 reward offered by Warner Bros. to anyone who can prove that Burt himself did not perform his daring stunts in The Flame and The Arrow."

in the newsreel. (R. 42, 43).

The court in this Finding finds that: " . . . said defendant did not offer to pay the sum of $1,000,000 or any sum to anyone who could prove that said Burt Lancaster did not do or perform all the stunt he was shown doing or purported to perform in said motion picture." (R. 43).

The court finds that the newsreel and the newspaper in which the reward was offered was received as Exhibit 6, but found that it was not true that the plaintiff did not gather or seek evidence or proof as required by said alleged offer or accept the offer and did not notify defendants of plaintiff's acceptance of the offer.[1] (Para. III, R. 43).

The court made Findings of Fact set out Conclusions of Law. (R. 40 to 47).

It finds that the defendant did not offer to pay $1,000,000 or any sum to anyone who prove that Burt Lancaster did not do or perform all the stunts he was shown doing or purported to perform in said motion picture. (R. 43). Then it finds that the plaintiff did not accept the offer as shown in the newspaper article and in the Motion Picture reel. (R. 43, sub. 3). Then it finds that plaintiff did not submit proof; then it finds that plaintiff did not perform any or all the conditions required by the contract to be performed on his part. (R. 44). Then, it finds that the alleged

[1]This is directly contrary to the evidence. The offer was to anyone who "can prove" etc. (R. 305; R. 313). The plaintiff communicated his acceptance to the studio and to Gordon Files, its attorney. (R. 144 et seq.; R. 187).

offer was, in fact, expressly withdrawn, before plaintiff attempted to accept the same. (R. 45, paragraph IX). Then it finds that Burt Lancaster himself actually performed "all his daring stunts shown in the picture The Flame and the Arrow," but further finds that Don Turner doubled for Burt Lancaster in carrying the character Rudi for about twenty-five feet along the crest of a roof, and carried a midget; but finds that this was not a stunt and this was not daring or dangerous. He also finds that in the sequence which shows a character Dardo riding into the courtyard on a horse which he brings to a stop, and in which he steps from the horse to a bed of a stationery two-wheeled cart, cuts the rope by which the character Pietro was suspended, and then drives the horse pulling the cart from the courtyard, was performed by one Don Turner, who doubled in said sequence for Burt Lancaster, but that the action of said sequence did not constitute a stunt, nor was it daring or dangerous. Without limiting the effect of the Court's finding that said Burt Lancaster did personnally perform all of his daring stunts in said picture, the Court finds specifically that he did do the entire sequence of the duel in which the character Dardo is shown fighting the character Alessandro, and that the only portions of said sequence which appeared on the screen in which the character Dardo is portrayed by a double, are two shots showing a portion of the shoulder and arm of Don Turner doubling for Lancaster. The Court also finds that said duel sequence was not a stunt and was not daring or dangerous. (R. 45, 46).

The court then concludes:

I.

"That no valid offer as set forth in the complaint herein was made by defendant Warner Bros. Pictures, Inc.

II.

"That said alleged offer was not accepted by the plaintiff herein nor was any attempt made to accept said alleged offer until after the same had been expressly withdrawn.

III.

"That Burt Lancaster himself did perform all his daring stunts in the motion picture The Flame and the Arrow.

IV.

"That the sequences shown in the picture The Flame and the Arrow wherein Don Turner appeared as a double for Burt Lancaster were not stunts and were not daring or dangerous." (R. 46, 47).

Upon these Findings, the Court gave judgment to the defendant corporation.

The court also denied a motion for attorney's fees and costs under Rule 37(c), F. R. C. P. although the defendant admitted giving a false answer to interrogations under Rule 36.

SPECIFICATION OF THE ASSIGNED ERRORS

The appellant specifies the following errors upon which he relies:

I.

The findings and conclusion of law, and each of them, are contrary to the law and the evidence.

II.

The decision and judgment of the United States District Court are contrary to the law and the evidence. An offer of reward was made and published throughout the nation, and accepted by the plaintiff. The plaintiff is entitled to the reward thus offered.

III.

The District Court erred in deciding and finding that, although an offer had been made by Warner Pictures, Inc., and in connection therewith an offer of $1,000,000.00 reward was offered if it could be proved that the star in the picture did not perform all the stunts therein shown, the plaintiff was not entitled to the reward because it had been withdrawn prior to the acceptance thereof.

IV.

The District Court erred in finding that an offer of reward made publicly through the medium of motion pictures can be withdrawn in any manner and in any way other than in the same manner in which the offer

was made. The evidence is that there was no such withdrawal.

V.

The District Court erred in deciding and finding that the acts of the hero in the picture (Burt Lancaster) which were not performed by him were not "stunts" within the meaning of the offer of reward.

VI.

The District Court erred in failing to make specific findings in accordance with the admitted and undisputed evidence, as follows:

(a) That the defendant Warner Brothers Pictures, Inc., a corporation, together with Norma Productions, Inc., a corporation, made the motion picture of "The Flame and the Arrow" under a contract, and after this motion picture was made it was distributed by Warner Brothers Pictures, Inc.

(b) That the defendant Warner Brothers Pictures, Inc., made a Newsreel offer, as part of its publicity campaign to distribute and sell the motion picture"The Flame and the Arrow", in which it offered a reward to the public, generally, including the plaintiff, of $1,000,000.00 to anyone who could prove that Burt Lancaster did not do or perform all of the stunts he was shown doing in the new picture "The Flame and the Arrow."

(c) The District Court erred in failing to find that in the Newsreel offer of reward to the public generally,

there were scenes taken in a bank vault in which Burt Lancaster and three newspaper reporters were shown in the presence of stacks of money, represented to be $1,000,000.00 in cash, and this newsreel had the following dialogue:

> "In Hollywood, Burt Lancaster counts the One Million Dollar Reward offered by Warner Brothers to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in 'The Flame and the Arrow.'"

(d) The District Court failed to find the undisputed fact that at about the time of the showing of the newsreel set out in the foregoing assignment, a news item appeared in the Los Angeles Daily Mirror, a newspaper of general circulation in Los Angeles County, which news item was based upon a press release issued by Warner Brothers Pictures, Inc., and was authorized, showing a picture of Burt Lancaster and the newspaper reporter, Kendis Rochlen, underneath which picture it was stated:

> "$1,000,000 if you can prove Burt didn't do it.
>
> "Things cannot be so bad in the movie business. Warner Brothers offered to give away $1,000,000 today. It is waiting in cash for anyone who can prove Burt Lancaster did not do all the stunts he is shown doing in a new picture. In 'The Flame and The Arrow,' apparently no drawing room drama, Lancaster performs somersaults from the horizontal bars, walks across a pole 35 feet above ground, and scales walls like a window washer, gone beserk."

This publication was made pursuant to press releases of Warner Brother Pictures, Inc., and never repudiated or withdrawn by them.

(e) That the District Court erred in failing to find that the defendant Warner Brothers Pictures, Inc., did not repudiate or disavow or withdraw the same publication or announcement, nor its newsreel offer at the time the plaintiff accepted the same, nor did it ever publicly repudiate or withdraw the offer. That it was accepted by the plaintiff and proof offered by him, which was rejected by the defendant.

VII.

The District Court erred in finding, contrary to the evidence, that the plaintiff failed to accept the offer and failed to notify defendant Warner Brothers Pictures, Inc., and its attorneys of said acceptance, and failed to notify them of the facts constituting the acceptance.

VIII.

The District Court erred in Finding of Fact X that the activities therein described, performed by Don Turner, a Hollywood stunt man, for Burt Lancaster, did not constitute stunts. This is clearly against the weight of the evidence, and the further finding that said stunts were not daring or dangerous is against the weight of the evidence.

IX.

Errors of law occurred at the trial, namely:

(a) The ruling in substance by the Court that acts done by agent corporations of defendant were not done by defendant.

(b) The interpretation of the offer in a strained and unnatural manner against plaintiff, when the offer was prepared by defendant, and the plain, reasonably meaning as contended for by plaintiff would give it life. The construction urged by the defendant and adopted by the court was one in favor of the defendant and against the plaintiff and made it meaningless and a trick and snare.

X.

The violation of Rule 33 of the Federal Rules of Civil Procedure by defendant in giving false answers under oath to Interrogatories submitted to said defendant, namely to Interrogatories No. 10 and No. 11.

XI.

The violation of Rule 36 of the Federal Rules of Civil Procedure by defendant in giving false answers to Request for Admission, namely to Request No. 3.

XII.

The District Court erred in failing to grant plaintiff's motion for attorneys fees and expenses under Rule 37 (c), which is designed to enforce the provisions of Rule 36. The rule is mandatory that a judge shall allow

a reasonable fee to attorneys bringing the suit, where the defendant fails to respond fully and truthfully to request for admissions.

XIII.

The District Court erred in failing to grant plaintiff's attorneys reasonable compensation for 250 additional hours of time spent and $600.00 expense incurred by reason of the failure of the defendants to make admission and thus "to expedite the trial and relieve parties of the costs and labor of proving facts which would not be in dispute on the trial and the truth of which could be ascertained by reasonable inquiry."

SUMMARY OF THE ARGUMENT

On or about July 17th, 1950, the defendant corporation, acting through its studio publicity department, caused publicity to be broadcast in the newspapers, to-wit, the Los Angeles Daily Mirror, a newspaper of general circulation, and its own motion picture newsreel, in which it offered One Million Dollars to anyone who could prove that Burt Lancaster (the star whose picture was depicted in the newsreel and the newspaper) did not perform the stunts in which he is shown doing in the picture "The Flame and the Arrow." The purpose of this publicity was to build up Burt Lancaster into another Douglas Fairbanks and to convince the world and the public wherever these pictures were shown that he was highly acrobatic and a skilled actor. Actually two different offers were

made. In the newspaper article in which he posed for pictures and caused to be published, the offer was $1,000,000 cash to anyone who can prove Burt Lancaster didn't do all the stunts. (R. 305). "It's waiting in cash for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in a new picture." (R. 305).

In the newsreel disseminated by a subsidiary corporation of Warner Brothers, the offer was $1,000,000 reward offered by Warner Brothers to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in "The Flame and the Arrow." (R. 313, R. 42-43). The offer was made and disseminated through the motion picture theatres of defendants' distributing corporations, and through the Los Angeles Mirror. It was thereafter published and broadcast and distributed and seen by plaintiff and the general public.

The plaintiff saw the motion picture and the newsreel, and thereafter communicated with Warner Brothers his acceptance of the offer, and offered to prove by telephone to Warner Brothers and to its attorney that Burt Lancaster did not perform all the stunts he was shown doing in the picture, and did not perform all his daring stunts shown in the picture. That the offer to prove these facts was made to Gordon Files, attorney for Warner Brothers Pictures, Inc., by the plaintiff personally and later by his attorney Morris L. Marcus.

An attempt was made by Gordon Files to withdraw the offer to the plaintiff personally, but the defendant at no time ever withdrew the offer in the same form or manner in which the offer was made.

That the plaintiff did communicate with Gordon Files, attorney for the defendant, that he can prove that Burt Lancaster did not do the stunts he is shown in the "Flame and the Arrow" to be doing and this constituted acceptance of the offer and a binding contract with the defendant. The plaintiff further did prove by admissions of the defendant and at the time of trial that Burt Lancaster did not perform many of the stunts shown in the picture in which it was represented that he did perform. That among the sequences in the picture which he did not perform was one showing the character "Dardo carrying the character Rudi for about twenty-five feet along the crest of the roof, in the distance and silhouetted against the sky." That this stunt was not performed by Burt Lancaster but by Don Turner, who doubled for Lancaster and carried a midget.

Plaintiff proved that in the sequence that showed the "character Dardo riding into the courtyard on a horse which he brings to a stop, and in which he steps from the horse to the bed of a stationary two-wheeled cart, cuts the rope by which the character Pietro was suspended, and then drives the horse pulling the cart from the courtyard, was performed by Don Turner,. who doubled in said sequence for Burt Lancaster." That in the duel scene between Burt Lancaster in which

the character Dardo was shown fighting the character Alessandro, there are shots of Don Turner doubling for Lancaster.

That upon the publication either through newspaper and its newsreel which Warner Brothers Pictures caused to be disseminated its offer of One Million Dollars it was a unilateral offer which upon acceptance became a binding contract. That the plaintiff did accept the offer and at no time was the said offer ever withdrawn as required in the case of an offer, by publication or pictures, and that the plaintiff's acceptance of the offer created a valid, binding contract which the defendant was required to perform and carry out. That the trial court's decision is contrary to law.

That the finding of the trial court are inconsistent, inadequate and contrary to the law and the evidence.

That plaintiff is also entitled to counsel fees and costs under Rule 37(c) for the reason that the defendants made false answers to the request for admissions under Rule 36 of the Federal Rules of Civil Procedure and Federal Rules of Civil Procedure §37(c).

That the defendants admitted that it falsely answered the question regarding the portrayal by double Don Turner for Burt Lancaster of the sequence in the picture "The Flame and the Arrow." (R. 66). And said admission of falsity entitles the plaintiff to said counsel fees and costs as prayed for.

ARGUMENT

I.

THE DECISION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT ARE CONTRARY TO THE LAW AND THE EVIDENCE. AN OFFER OF REWARD WAS MADE AND PUBLISHED THROUGHOUT THE NATION, AND ACCEPTED BY THE PLAINTIFF. THE PLAINTIFF IS ENTITLED TO THE REWARD THUS OFFERED.

The defendant, through its agents and representatives, caused two offers of reward to be made and broadcast.

The defendant corporation caused an offer of reward of $1,000,000 to be made in the Los Angeles Mirror, on Monday, July 17, 1950, as follows:

> "Things can't be so bad in the movie business. Warner Bros. offered to give away $1,000,000 today.
>
> "It's waiting in cash for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in a new picture." (R. 305).

Another offer of $1,000,000 was made in the newsreel, as follows:

> "In Hollywood Burt Lancaster counts the $1,000,000 reward offered by Warner Bros. to anyone who can prove that Burt himself did not per-

form his daring stunts in 'The Flame and the Arrow.' " (R. 42, 43).

The plaintiff accepted the offer. The offer never was withdrawn, even to this date, in the form and manner required by law, which is through the same medium as the offer.

The plaintiff in this case not only could prove the offer being to anyone who "can prove"—but did prove —that the actor Burt Lancaster did not perform "all his stunts shown in the picture, nor all his daring stunts." The offer to anyone who "can prove" and communication of acceptance alone to the defendant corporation, or its attorney, was sufficient to establish a binding contract. The abortive attempt of the attorney to "withdraw" the offer after the plaintiff had communicated with him was not and could not avoid the plaintiff's acceptance and binding effect of the contract.

The case being tried in California and the offer having been made in California is governed by the laws of the State of California.

Erie v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.

In *Ryer v. Stockwell,* 14 Cal. 134, 73 Am. Dec. 634, it was held that the offer of reward of compensation by public advertisement, either to a particular person or a class of persons, or to any and all persons, is a conditional promise. That if anyone to whom such offer is made shall perform the service before the offer

is revoked, such performance is a good consideration and the offer becomes a legal and binding contract and may be enforced by a person performing the services. (See *Wilson v. Stump,* 103 Cal. 255).

And, before an offer of reward can be revoked—it can only be revoked in the same form and manner that the offer was made, and with the same amount of publicity or publication.

Shuey v. U. S., 92 U. S. 73, 23 L. Ed. 697.

In *Carlill v. Carbolic Smoke Ball Co.,* 1 Q.B. 256, the proprietor of a medicine published an offer to pay one hundred pounds to anyone who should use his medicine as directed and thereafter catch influenza. In reliance on this, the plaintiff used the medicine and caught the influenza. The use of the medicine was an operative acceptance consummating a unilateral contract. No notice was necessary.

The contract in this case was a unilateral contract which was consummated as soon as the first substantial act had begun by the plaintiff. And see the following cases:

Robertson v. U. S., 343 U. S. 711; 96 L. Ed. 1237, 1240;

Williams v. United States, 12 Court of Claims 192;

Stone v. Dysert, 20 Kans. 123;

Mosley v. Stone, 56 S. W. 965, 108 Ky. 492;

Louisville & M. R. Co. v. Goodnight, 10 Bush 552, 19 Am. Rep. 80;

Stevens v. Brooks, 2 Bush 137.

Where a reward has been offered for the finding and return of lost property, the offer is not revokable after part performance in reliance upon it, even though the offerer gives notice before there has been an actual return of the property. Even in such case the finder has the lien to secure payment of the reward.

Wilson v. Guyton, 8 Gill. 213 (Md), Mass.;
Wentworth v. Day, 3 Met. 352, 37 Am. Dec. 145;
Wood v. Pierson, 7 N. W. 888, 45 Mich. 313;
McFarlane v. Bloch, 115 Pac. 1056, 59 Ore. 1; Ann. Cas. 1913B 1275;
Cummings v. Gann, 252 Pa. 484;

In *Robertson v. U. S.,* 343 U. S. 711, 96 L. Ed. 1237, 1240 the court said:

> "The acceptance by the contestants of the offer tendered by the sponsor by the contest creates an enforceable contract. See 6 Corbin on Contracts, Sec. 1489; Restatement, Contract, Section 521."

See also published offers of reward, *Scott v. People's Monthly Company,* 228 N. W. 263, 209 Iowa 503, 67 A. L. R. 413; *Reif v. Paige,* 13 N. W. 472, 55 Wis. 496, 42 Am. Rep. 731.

The plaintiff accepted the reward before there had been any revocation as required by law. To this date there never has been any revocation, either in newsreel or newspaper publicity.

The rule regarding revocation is set forth by the United States Supreme Court in *Shuey v. United*

States, 92 U. S. 73, 23 L. Ed. 697, to the effect that where an offer has been made by a publication to a large number of unidentified persons, the power of acceptance is created in all those who read it. This power can be terminated or revoked by publication in the same manner as the offer.

The rule set forth in Restatement of the Law on Contracts, Section 43, is that:

> "An offer made by an advertisement in a newspaper, or by general notification, to the public or to a number of persons whose identity is unknown to the offerer is revoked by an advertisement or general notice given publicity equal to that given to the offer before a contract has been created by acceptance of the offer."

In *Carr v. Mahaska County Bankers Association,* 260 N. W. 494, 222 Iowa 411, 107 A. L. R. 1080, it was held that where a bank had offered a reward for the capture of bank robbers by tacking up a poster containing the offer it was not an effective revocation for the cashier to remove that poster. (See also *Sullivan v. Phillips,* 98 N. E. 868, 178 Ind. 164, Ann. Cas. 1915 (B) Sec. 670.

II.

THE FINDING AND CONCLUSIONS OF LAW ARE CONTRARY TO THE LAW AND THE EVIDENCE.

(A)

ALL THE EVIDENCE CONCLUSIVELY SHOWS THAT TWO OFFERS WERE CAUSED TO BE MADE BY WARNER BROTHERS PICTURES, INC., THROUGH THEIR AGENTS AND REPRESENTATIVES — BURT LANCASTER AND THE WARNER BROTHERS PICTURES, INC., PUBLICITY DEPARTMENT AND ITS TOTALLY OWNED SUBSIDIARY, WARNER'S NEWSREEL, THE COURT NEVERTHELESS FOUND IN FINDING IX "THAT NO OFFER AS SET FORTH IN THE COMPLAINT WAS MADE BY DEFENDANT WARNER BROTHERS PICTURES, INC., OR FOR IT OR ON ITS BEHALF."

This Finding, also, inconsistently finds that "Said alleged offer was in fact expressly withdrawn before plaintiff attempted to accept the same."

Thus the finding says first that *no offer* was made; and then it says that the *offer* was withdrawn. Where a court makes inconsistent findings of fact, the judgment should be reversed since they tax judicial credulity, ignoring plain reality, and override inescapable convictions." *U. S. v. Muschany* (C.C.A. 8) 139 F. (2) 661.

Section 392, California Code of Civil Procedure.

In *Mayo v. Lakeland Highlands Can. Co.,* 309 U. S. 310, the court said:

"Statements of fact are mingled with arguments and inferences for which we find no sufficient basis either in the affidavits or the oral testimony.

"It is of the highest importance to a proper review of the action of a court . . . that there should be fair compliance with Rule 52(a) of the Rules of Civil Procedure."

The findings find (1) that there was no contract; (2) that there was a contract, but that it was withdrawn; (3) that there was a contract which was not withdrawn, but was not fully complied with by the plaintiff (Findings IV and V). The court finds that Burt Lancaster did not perform the stunts shown in the picture to have been performed (Finding X) but that he did perform all his daring stunts shown in the picture.

Thus, the findings represent characteristically defenses often set up in criminal cases—"There was no conspiracy; if there was a conspiracy, I didn't join it; if I joined it I withdrew before the conspiracy went into effect; if I didn't withdraw, my acts were perfectly lawful; what I did, I did in self-defense." The findings are about that consistent and that satisfactory.

Finding X is clearly against all of the evidence and the law.

In Finding X the court specifically finds that the sequence in said picture which showed the character

Dardo carrying the character Rudi for about 25 feet along the crest of a roof, in the distance, and silhouetted against the sky, was actually performed (not by Burt Lancaster) by one Don Turner, who doubled for Lancaster and who carried a midget. This finding was alone sufficient to sustain the plaintiff's case.

But, the court said that it finds that the action so portrayed "was not a stunt and was not daring or dangerous." However, the definition of a "stunt" according to Webster is as follows:

> "Stunt"—a feat or performance, as an athletic contest, striking for the skill, strength, or the like, required. Hence any unusual feat or performance, especially done to attract attention, general applause, etc."

However, the picture itself defined what is a "stunt" and what is daring or dangerous. The motion picture made a representation to the public in this scene as being a stunt and as one that was daring or dangerous. It was not the part of the court to re-define it, as the offer of the million dollars, to-wit, Warner Brothers Pictures through its publicity department and its star Burt Lancaster, represented to the public that this was a stunt and was daring and dangerous. As such it gave its own definition to the terms of the offer, and the public and the plaintiff had a right to look to the picture as to what constituted the offered reward.

The Court further found that in the sequence which shows "the character Dardo riding into the courtyard

on a horse which he brings to a stop, and in which he steps from the horse to the bed of a stationary two-wheeled cart, cuts the rope by which the character Pietro was suspended, and then drives the horse pulling the cart from the courtyard, was performed by one Don Turner, who doubled in the said sequence for Burt Lancaster." (Finding X). This also was a stunt within the definition given it in the picture and entitled the plaintiff to judgment, but the court went on to find: "That the action of said sequence did not constitute a stunt nor was it daring or dangerous." This finding is unsupported by the picture itself which gave it definition, or by the evidence. It was not for the court to find contrary to the definition given by the offerers themselves as to what they deemed was a *stunt* and was daring or dangerous as shown in the picture. Furthermore, there were two offers made—one was through the medium of the Los Angeles Mirror, (R. 305), which made the offer of the $1,000,000 "for anyone who can prove Burt Lancaster didn't do all the stunts he is shown doing in the new picture." That offer did not define or limit the offer to "daring stunts" but all the stunts which Burt Lancaster is shown doing in this picture. After the publication in the Los Angeles Mirror was seen by the Publicity Department of Warner Brothers no offer was made to correct it or change it, but every effort was made to take full benefit of the publicity which was given to it. An offer thus espoused by the Studio Publicity Department is binding upon them, and the court erred

in its finding attempting to limit the stunts to those that were "daring or dangerous."

The second offer through Warner Brother's Newsreel did mention the word "daring". It stated that it was a genuine bona fide offer. (R. 314). The offer proposed and represented that Lancaster was doing somersaults from six horizontal bars sixty feet in the air. (R. 313). Actually the proof by the plaintiff showed that he was not over 20-feet in the air.

The evidence also showed that in the sequence where the band rides into the courtyard to rescue Papa Pietro with sapling spears, in which there was a hand-to-hand encounter, Don Turner doubled for Burt Lancaster in the part of Dardo, (R. 165) and that Turner rode into the square and engaged in some part in the fight with the soldiers where he was using the sapling spears. And, then in the following sequence, where the character Dardo jumps onto the ex-cart and cuts Papa Pietro down and drives the team out of the square, he doubled for Burt Lancaster. (R. 166). In the character of Dardo he drove one horse out. In the next sequence, near the end of the picture, there is a sword fight between Alessandro and Dardo that occurs there at the time that Dardo kills Alessandro, which occurred in the castle shortly before the time that Ulrigh was killed by the bow and arrow by Dardo, Don Turner played the part of Dardo in two shots in the picture. In that duel, his back was to the camera. (R. 166, 167).

Under Federal Rule of Civil Procedure 52(a), it is contemplated that there be a system of findings which are of fact and definite.

Footnote, headnote 3, Dalehite v. United States, 346 U. S. 24, 25, 97 L. Ed. 1435.

When Findings of Facts by a trial court are clearly erroneous, judgment should be reversed.

United States v. U. S. Gypsum Co., 333 U. S. 395.

A finding is clearly erroneous when the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

United States v. U. S. Gypsum Co., 333 U. S. 395, 92 L. Ed. 766.

When a finding is against the weight of the evidence it is clearly erroneous, Rule 52(a), Federal Rules of Civil Procedure.

Maple Island Farm v. Bitterling, 209 Fed. (2) 867;
Kasper v. Baron, 207 Fed. (2) 744;
Aetna Life Ins. Co., v. Kepler, 116 F. (2) 1.

(B)

THE CONCLUSIONS OF LAW, THUS DRAWN FROM THE INCONSISTENT FINDINGS WERE LIKEWISE INCONSISTENT. (R. 45).

The first conclusion is that no valid offer was made by Warner Brothers. The second, that the offer was not accepted until after the same was withdrawn, which is inconsistent with the fact that no offer was made because it could not be withdrawn if no offer was made.

The third conclusion that Burt Lancaster himself did perform all his daring stunts in the motion picture The Flame and the Arrow presupposes that there was a valid offer made and accepted, but that the proof did not measure up to the offer as made, which is inconsistent with the other findings and conclusions.

And, the fourth conclusion "That the sequences shown in the picture The Flame and the Arrow wherein Don Turner appeared as a double for Burt Lancaster were not stunts and were not daring or dangerous" is an admission that Don Turner did appear in place of Burt Lancaster, and that he did appear in what the picture represented and portrayed as stunts, and that it was not Burt Lancaster. The conclusion is inconsistent with the definition by the motion picture itself as to what is a stunt and what is daring.

The conclusions, clearly erroneous under Rule 52(a) F. R. C. P. therefore, are contrary to the law and the evidence and entitled the plaintiff to his recovery.

Morris v. Williams, 149 Fed. (2) 703, 707, and see cases supra;

S. Bicca-Del Mac v. Michins Shoe Co., 145 F. (2) 389, 407.

III.

THE COURT ERRED IN ITS RULING THAT THE OFFERED REWARD HAD BEEN WITHDRAWN PRIOR TO THE ACCEPTANCE THEREOF.

The withdrawal was attempted by attorney Gordon L. Files, representing Warner Brothers, after the plaintiff had notified him that he would prove that Burt Lancaster did not perform all the stunts shown in the picture.

A published offer of a reward can only be withdrawn in the same form and manner in which it was made, and where it is offered through motion pictures and broadcasts and through the newspapers, it can only be withdrawn in the same manner.

Shuey v. United States, 92 U. S. 73, 23 L. Ed. 697;

Restatement of Law on Contract, Section 43.

"A. Mr. Garrison or a person who introduced himself as Jules Garrison, and it was the same voice that I had talked to the first time, telephoned me at my office, and got me on the phone and asked me what we had decided to do. I told him that I had made some investigations and it was our position that no offer had been made; that if he thought there had been any offer made it is withdrawn and he should consider it withdrawn. I told him further that I had made some investigation as to how the picture had been made and that it was our understanding that Mr. Lancaster had performed all of his own stunts in the picture." (R. 191.)

The abortive attempt by the attorney to withdraw the offer by this individual communication was therefore of no effect and did not constitute a withdrawal. The withdrawal had to be in the same form and manner in which the original announcement was made, or at least through the same medium. There was no attempt to withdraw at any time, even to this date, either through the Los Angeles Daily Mirror or through the Warner Brothers' Newsreel.

IV.

THE DISTRICT COURT ERRED IN DECIDING AND FINDING THAT THE ACTS OF THE HERO IN THE PICTURE PERFORMED BY DON TURNER IN PLACE OF BURT LANCASTER WERE NOT "STUNTS" WITHIN THE MEANING OF THE OFFER OF THE REWARD.

Definition as to what constituted a stunt was given by the picture itself. The word "stunt" must be taken in its usual and ordinary meaning. That definition has been previously set out herein.

Coupled with the definition was the picture's own depicting of what were stunts and also what might be deemed to be daring.

V.

THE DISTRICT COURT ERRED IN FAILING TO MAKE FINDINGS IN ACCORDANCE WITH THE ADMITTED AND UNDISPUTED EVIDENCE.

As are set out in specification VI supra, a party is entitled to specific findings on undisputed evidence Rule 52 F. R. C. P.

VI.

THE DISTRICT COURT ERRED IN DENYING PLAINTIFF REASONABLE EXPENSES AND REASONABLE ATTORNEY'S FEES UNDER RULE 36 AND RULE 37(c) RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES.

Upon request for admissions by the defendant as to the part played by Burt Lancaster and Don Turner in the picture The Flame and the Arrow, the defendant falsely answered the same. This was admitted in the affidavit of Eugene D. Williams, one of the attorneys for Warner Brothers Pictures, Inc., as follows:

> "That the person in the motion picture 'The Flame and the Arrow' portraying the character 'Dardo' in the sequence where 'Dardo' carrying 'Rudi' is shown in a long shot running along the crest of the roof of a church or high building was not portrayed by Burt Lancaster, but was portrayed by a double, Don Turner. There is, how-

ever, another sequence immediately preceding that sequence in which Burt Lancaster in the character of 'Dardo' does carry the midget depicting the character 'Rudi' along the lower edge of the same roof and therefore in respect of that latter sequence the answer to the Request for Admissions is true, while in respect to the former sequence it is not true." (R. 66.)

The affidavit thereafter seeks to justify the false answer to Interrogatory No. 3. However, Rule 37(c) provides for the payment of counsel fees and costs where a false admission is made. The reasons for the false admission do not waive the requirement of payment; otherwise the rule would be a nullity.

Modern Food P. Co. v. Chester Pack. etc. Co., 30 Fed. Supp. 520;
Metropolitan Life Ins. Co. v. Everett, 15 F. R. D. 498, 499.

WHEREFORE, plaintiff prays for reversal of the judgment and order below on each of the grounds set forth in this brief, with directions to the court below to enter judgment for and on behalf of the plaintiff for One Million Dollars with interest, and costs; and to enter judgment for the plaintiff for costs and attorneys fees under Rule 37(c), Rules of Civil Procedure for the District Courts of the United States.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellant.

No. 14,316

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JULES GARRISON,

Appellant,

vs.

WARNER BROS. PICTURES, INC., a corporation,

Appellee.

APPELLEE'S BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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APPELLEE'S BRIEF.

Statement of the Case.

The appeal herein involves two completely different claims: (a) a claim for an even million dollars as a reward and (b) a claim for attorneys' fees and costs asserted to be payable under Rule 37(c) of the Rules of Civil Procedure based upon an assertion of partial falsity in the answer to one of many interrogatories.

The basic controversy concerns events occurring during the production of a motion picture called "The Flame and the Arrow" made in 1949 by Norma Productions, Inc. (not a party hereto) and distributed by appellee, and an asserted offer of a reward made during the publicity campaign of that picture.

The motion picture, which was viewed by the Trial Court, and is in evidence, depicts the adventures of a local hero of the Robin Hood type in his conflicts with his feudal lord, in a medieval Italian setting. The hero, "Dardo," is played by Burt Lancaster, a well known actor and a corporate officer of Norma Productions, Inc. [Tr. p. 113]. The action is violent and full of fights, chases

and rescues, with acrobatic feats portrayed in many places of the type made famous in the days of silent films by the late Douglas Fairbanks. The appellant himself was an "atmosphere player" or "extra" in the making of the picture [Tr. p. 147].

At or about the time the picture was released for exhibition in Los Angeles, a newsreel was also exhibited. This newsreel contained a shot or clip showing Lancaster with three local newspaper reporters counting a heap of money dollar by dollar. The narrator in introduction makes the statement quoted or paraphrased many times by appellant (Op. Br. pp. 5, 16, 22, 26, 29-30) that:

> "In Hollywood, Burt Lancaster counts the one million dollar reward offered by Warner Bros. to anyone who can prove that Burt Lancaster, himself, didn't perform his daring stunts in 'The Flame and The Arrow' ".

[Pltf. Ex. 6; Tr. p. 313]. The newsreel had been put out by a subsidiary of appellee and appellee had made arrangements for the clip or shot to be filmed by the newsreel company.

At about the same time an item appeared in the Los Angeles Mirror which appellant also quotes several times (Op. Br. pp. 4, 22, 26; see photo reproduction [Tr. p. 305]), the language used being that of the newspaper. There was also an unpublished press release [Ex. 4; Tr. p. 307]. Nowhere is it stated that Lancaster was the person photographed every time the character "Dardo" appeared on the screen, as appellant infers.

However, the issues of fact as to performance of "stunts" as tendered by appellant were limited to three episodes or scenes, identified throughout the record as (1) an escape over a roof, (2) a courtyard rescue and (3) a

duel. Only as to these three sequences did appellant claim that there were "stunts" in the picture which Lancaster had not personally performed.

The issues in the case are almost entirely factual and on each of such issues the Trial Court on adequate evidence has found against the appellant. These issues are (1) whether Lancaster did or did not do the three things above listed, (2) whether these were "stunts" and (3) whether in any case there was a contract between appellant and appellee which should be recognized and enforced by a court. Since the questions are mainly whether the findings against the appellant are supported by the evidence, detailed presentment of the facts will appear in connection with the specific points. The facts concerning or relevant to the claim for costs and fees under Rules 36 and 37(c) will be separately discussed.

The questions and the evidence are plain and clear, and do not involve, as appellant infers, any need to draw fine lines or to be technical in the meanings of terms. Appellee asserts Lancaster did do the "daring stunts" and that the three incidents on which appellant's entire claim rests were not only not "daring stunts" but were not stunts at all, and besides that Lancaster had actually done the two most important of these in any case. The evidence shows that Lancaster had been a circus acrobat for years and was by no means a false front. In the picture he did a great many spectacular and hazardous acts or feats and these are not only proved but are not questioned. At no time can it be assumed that Lancaster was merely being puffed or built up to something essentially different by mere press agentry—he was a real and bold acrobat doing difficult, dangerous and spectacular things, and this was proved.

ARGUMENT.

The question of first importance here is, we believe, the matter of what Lancaster did in the making of the picture and how it was done, assuming for the time that there had been an offer of reward accepted as appellant claims.

I.

The Record Supports the Findings and Conclusions of the District Court That Lancaster Did Do All the Stunts in Question Here.

The Trial Court found [Finding X, Tr. pp. 45-46] that Lancaster had actually performed all his daring stunts shown in the picture. It found that two specified shots or sequences in the picture had been actually performed by one Don Turner and not by Lancaster, but that neither of such episodes was a stunt and neither was daring nor dangerous. A third incident or sequence was held not to be a stunt and in addition it was found that the entire sequence was performed by Lancaster, although on the screen two minor shots of an arm and shoulder of Turner appeared [Tr. p. 46]. The sequences are described by the Court and are those on which appellant attempted to base his claim for reward.

The first of the episodes described in Finding X is a distant or long shot silhouette scene in which the character Dardo carries the character Rudi along the crest of a roof. The second is a courtyard scene in which the character Dardo rides a horse to a cart, stops the horse, steps onto the cart, cuts down the figure of another character who was being hanged and then drives the cart from the courtyard. The third is a dueling sequence between the character Dardo and the character Alessandro. The

actual Finding on this latter sequence is that it was entirely performed by Lancaster as shown on the screen, with the exception of two shots which showed a portion of the shoulder and arm of a "double" for Lancaster [Tr. p. 46].

These findings are fully supported by the record. Lancaster himself was a witness and also the other actors who were directly involved. There is no conflict. Appellant in his Opening Brief indicates and quotes the testimony on direct examination of the witness Turner (Op. Br. pp. 11-16) as constituting proof that Lancaster did not do all of the stunts he was represented as doing. The incidents on which Turner was questioned and to which he made replies are the three above mentioned and on which there are specific findings. Turner's testimony as quoted is only a part of his testimony, and is only a small part of the evidence relating to the episodes.

The picture in evidence is a normal feature length photoplay and includes much strenuous action, a great deal of which is done by the character Dardo. The part of Dardo was played by Lancaster. In the full length of the picture, therefore, only the three episodes or sequences mentioned are in any way in issue and these must be considered somewhat in detail.

(a) The First Episode.

Here one character carries another along the apparent crest or peak of a roof. That roof was part of a motion picture set and a sketch showing a cross section of the structure is in evidence as defendant's Exhibit A [Tr. p. 390]. It was also described by witnesses [Tr. pp. 175, 220, 248-249]. As in other motion picture sets, only the part actually showing in the picture is normal, that is, this

set like most sets is merely a front. As shown by the sketch, the front portion of the roof appeared as a steep gable running to a crest 24 feet from the ground. In the photoplay the building seems to be a normal front and a normal pitched roof. Along the crest or the apparent peak of the roof on the side away from the camera, there was scaffolding. Right at the apparent peak and running lengthwise was a 2 foot path or platform made of 2 x 12 inch timbers. Three feet 8 inches below that runway was another platform or runway which was an additional 3 feet or so wide complete with a 3 foot 6 inch railing or guard. This was for use by the electricians or other technicians and was not especially built [Tr. pp. 248-249, 251]. The runways, the scaffolding and the guard rail did not, of course, show in the picture.

In the episode, Dardo is shown escaping with Rudi, a small boy. The action on the roof top was only a small part of the scene. In the whole sequence the action shows the rescue of the boy in a crowd in the courtyard by Dardo, during which both Dardo and the boy are thrown over the heads of the crowd. Dardo next runs up a ladder or scaffold on the edge (which collapses after him and is not to be confused with the permanent scaffold or runway at the back) and then up the roof carrying the boy [Tr. p. 202]. This part of the action, which was both difficult and dangerous, was without question performed by Lancaster [Tr. pp. 174, 202-203, 234]. At the peak of the roof, however, though this was not apparent in the photoplay, the sequence changed and the figure, though still apparently the character Dardo carrying the character Rudi, continued in the distance along the crest of the roof. Actually, this was along the prepared path or runway. Rudi, the one being carried, described this runway as

"safe enough for * * * an elephant to walk * * *" [Tr. p. 238]. In this portion of the action as included in the final picture and shown to the public, that is to say, the sequence along the runway, Don Turner was the actual person filmed as representing Dardo. However, Lancaster had done the precise thing first, as a test on rehearsal, and both Rudi, as the character being carried, and the script girl so testified [Tr. pp. 235, 236, 259-260].

There is no question about the facts involved. Lancaster did the difficult and dangerous portion of the sequence and, when it became merely work, his place was taken by Turner. The Trial Court did believe and it did find that the part of the sequence done by Turner in this connection was not a stunt. There is also no contradiction of the testimony showing Lancaster also *had* done even that part of the sequence, whether or not it was a stunt or appeared in the picture, though there is no finding as to this fact.

In contrast with the kind of thing involved in the carrying of the figure of a small boy along an adequately broad pathway, the evidence showed clearly that there had been a great number of very difficult acrobatic feats done by Lancaster personally which would certainly be considered stunts in any definition thereof. The testimony showed that Mr. Lancaster had done great swings on bars many feet above the ground, had walked across an open space many feet above the ground upon a slender pole like a tightrope and had done many leaps, somersaults, falls and other things such as circus acrobats do at times, all requiring boldness, courage, skill and training [Tr. pp. 199-202, 211-216]. On one small episode, where he caught another character at the end of a leap, he had practiced for three weeks [Tr. pp. 199-200].

(b) The Second Episode.

This concerns a courtyard scene in which a horse is ridden by Dardo to a country cart standing beneath a gallows. Dardo stops the horse, steps from it to the cart which is serving as a platform under the gallows, cuts down the figure of a character in the process of being hanged and drives the cart away [Tr. pp. 209-210, 223-224]. Two shots of this scene were done by Turner as Dardo, *i. e.,* in place of Lancaster. There were no high speed leaps from a running horse or anything of that sort. The horse being ridden had stopped and the cart was stationary and had a low bed [Tr. p. 171]. The head of the horse harnessed to the cart was being held, so there could be no movement. It was again merely work and as such performed by Turner as a double for Lancaster. It should be noted that Turner appeared in various scenes when he was not doubling for Lancaster but was merely a horseman or other general character. This was true as to most of the courtyard melee. Turner may have been there but not as Dardo or as a double for Lancaster [Tr. pp. 223-225] and most of the time was on the sidelines [Tr. p. 171].

(c) The Third Episode.

This is a sword fight or duel between the characters Dardo and Alessandro. The Court found that all of this episode was actually performed by Lancaster with the exception of two shots in which the camera shows only the arm and shoulder of the character Dardo. The evidence shows again that Lancaster in fact did the whole sequence [Tr. pp. 215-216, 229], but that the sequence had also been done many other times [Tr. p. 179] and that in the

photoplay the two shots mentioned by the Court were interpolated from one of the other recordings.

The duel in the picture appears to be a violent combat but the evidence also shows how such scenes are made and such explanation shows the episode, including each of the two small shots of Turner's arm and shoulder, is certainly not a stunt. The witnesses Cavens and Turner both testified as to the making of this scene. Cavens is a fencing instructor. He referred to himself as a "motion picture choreographer of fencing" [Tr. p. 229]. Turner was a student of Cavens and also experienced in fencing. The duel scene in actuality differs greatly from actual combat or even competitive fencing. The results are known beforehand and the experts involved in effect study and design the whole affair. The steps, the movements, the blows, the parries, the advances and retreats are all laid out, memorized and practiced in advance in the same way that the choreography of a ballet is established. Each of the duelists knows exactly what the other is going to do, how he is going to do it and when it is to be done [Tr. pp. 176-178].

This scene was designed and laid out by Cavens and Turner, after which they rehearsed it with the actors who were to play Dardo and Alessandro [Tr. pp. 230-231]. Dardo was Lancaster and he actually did and was photographed doing the whole sequence [Tr. pp. 215-216, 229]. In the edited version of the picture as presented to the public, the figure shown as Dardo in that duel is Lancaster with, as noted, two trivial exceptions [Tr. pp. 167, 230, 232-233]. In two shots the camera is so placed to get a full face view of Alessandro over the shoulder of Dardo. Turner was serving almost as a piece of scenery while the camera focused upon the action of Ales-

sandro. Turner was used here in place of Lancaster, as the testimony shows, to save the producer the money and time necessary in having Lancaster do that part of the performance [Tr. pp. 178-179]. Similarly, when the time of the actual performance of the part of Allessandro could be saved, the work was done by Cavens [Tr. p. 229]. There is not the slightest evidence that these substitutions were made because of any risk or particular skill needed for that part of the episode or any particular part of the swordplay.

II.

The Findings As to What Are and What Are Not "Stunts" Are Correct.

Appellant seems to urge that these three episodes were stunts because Don Turner was and is classified as a "stuntman" and "double" in the industry and it was Don Turner who did the specific things herein mentioned. In the portion of Turner's testimony quoted by appellant (Op. Br. p. 15), he apparently wishes to leave the impression that, because Turner received extra pay in connection with these episodes, then therefore they must be stunts. The actual testimony of Turner was that he was always on a stuntman's pay as his basic rate whenever he was working in a studio [Tr. pp. 167, 180]. Any time there was additional work performed or time could be saved by his skill or knowledge, there was an adjustment of salary above the base pay of a stuntman [Tr. pp. 167, 168]. Mr. Turner, for instance, testified that he got a minimum of $100.00 per day for doing fencing [Tr. pp.

168, 180] because it was a skill he had learned. For hazardous work he received $1,000.00 per day [Tr. p. 170]. In the case of the duel, he was on payroll as a fencing instructor for a period of two weeks [Tr. p. 181]. No deduction or inference as suggested by appellant can legitimately be drawn merely from Mr. Turner's classification or salary rates. The contrary conclusion is plain from these facts that the work done by Mr. Turner was not hazardous and required far less effort, nerve and skill than ordinary fencing. This evidence abundantly supports the Trial Court's finding that such routine work is not a "stunt"—daring or otherwise.

Appellant also argues that (Op. Br. p. 36) the picture itself defines a "stunt" and what was daring or dangerous. The fact that there was no actual danger in any of the three episodes in question is perfectly clear—no more danger than walking into the court room, as the Court said [Tr. p. 208], insofar as these parts portrayed by Turner were concerned. But appellant would have it that if it looked hazardous in the picture it was a "stunt." This disregards entirely the fact that any motion picture in its entirety is an illusion. No picture actually moves in a "moving picture." Actors do not really kill each other, even though the villain appears to have been stabbed through the heart. The fact that an actor appears to have received a mortal wound does not make his work necessarily hazardous. Thus what constitutes a "daring stunt" cannot be tested by the apparent danger created through the ordinary practices of the

dramatic arts. Moving along a two-foot runway which would be "safe enough for an elephant to walk on" does not become a stunt, with or without daring, merely because on the screen it looked like the sharp peak of a roof.

Nor should it be overlooked that this is not a case where an ordinary member of the public has been led astray by illusion or looks. The appellant Garrison was himself an actor in the making of that picture, an atmospheric player, as he himself said [Tr. p. 147]. The newsreel, in contrast to the picture, did say that making somersaults from six horizontal bars was a stunt [Ex. 6, Tr. p. 313]. This feat was real and was hazardous and Lancaster did it [Tr. pp. 211-212], whether the bars were 20 feet in the air, as the news release of appellee stated [Tr. p. 308] and as appellant points out (Op. Br. p. 38) or 60 feet as the newsreel indicated. Lancaster spoke in the newsreel about this particular feat, and he also indicated he had been a circus performer. The proper inference—the one drawn by the Trial Court—was "daring stunts" meant acrobatic feats of this kind.

Appellant cites Webster's definition (App. Op. Br. p. 36) and that definition of a stunt as "a feat * * * striking for the skill, strength or the like, required" when applied to any of these episodes gives completely negative results. Riding a horse, stepping to a stationary cart or going along a two-foot runway carrying a child are neither "feats" nor "striking" for any skill, strength or other similar quality.

III.

The Decison That There Was no Contract Between Appellant and Appellee Is Correct and Consistent.

Any contract here must be found in an offer made by or binding on appellee and accepted according to the terms of such offer by appellant before withdrawal. The issues are of fact. The findings are against appellant on all questions and are supported by the evidence. Appellant claims the findings are inconsistent and contrary to the evidence.

(a) The Alleged Offer.

Finding II [Tr. pp. 40-42] first describes the newsreel as filmed. The dialogue therein spoken [Tr. pp. 313-314] by Lancaster or the newspaper reporters certainly does not make an offer. His first words convey the idea that he is counting dollar by dollar a heap of bills containing a million, and that he has done such counting three times. A moment's thought shows that at a dollar a second it would take in excess of three months of eight-hour days to do any such thing. The dialogue does not even mention appellee. It does mention "any producer." The finding then [Tr. p. 42] sets forth the language of the narrator in his introduction, both as furnished by appellee and in the different language as actually given. The Court then finds [Tr. p. 43]:

> "That except as herein found no other offers or purported offers * * * were made or authorized by the defendant * * *"

and then specifically that there had been *no* offer to pay anything to anyone

> "who could prove that said Burt Lancaster did not do or perform all the stunts he was shown doing or purported to perform in said motion picture."

The newsreel text, either as actually given or as supplied by appellee, if construed as an offer, refers only to "his daring stunts" (actual) or "all stunts attested to by the stuntmen who worked in the picture" (supplied). The complaint asserted an offer [Tr. p. 5, Par. VI] referring to "all of the stunts he was shown doing or *purported to perform* in said motion picture." The Court rejected the claim on the facts as to the stunts under the language of the newsreel, which was clearly limited, and by necessary inference found the material appearing in the Los Angeles Mirror was no offer by appellee on any terms. There is no evidence nor is it true that the Mirror was in any way affiliated with or an agent of or controlled by appellee. The language of the item in the paper [Ex. 3, Tr. p. 305] and that of the press release [Ex. 4, Tr. p. 307] are substantially different with reference to the stunts. The actual published item literally means nothing under the language selected by the newspaper, for even without proof it is clear that Lancaster would do all the stunts *"he* is shown doing." Neither version is such as would support appellant's claim. The facts concerning performance have already been presented and it seems clear that the only offer which might help appellant would be one completely unrestricted by any reference to "stunts" but enlarged to state that every time Dardo appeared on the screen it was actually Lancaster and that he had never been doubled in any scene. No evidence of any kind shows the existence of any such offer, nor does

any evidence contradict the Conclusion of the Court [No. 1, Tr. p. 46] that there had not been an offer as alleged nor otherwise than as presented by the newsreel. Much less was there any offer sufficient to support the position of appellant on the proof made.

(b) No Acceptance.

Finding III [Tr. p. 43] is that there was no acceptance of any offer as alleged by appellant [Par. VII, complaint, Tr. p. 5]; Finding IV [Tr. p. 44] is that appellant had not submitted proof in compliance with the alleged offer, and did not perform the conditions of the alleged contract [Finding V, Tr. p. 44].

The evidence as to the claimed acceptance consists of the testimony of each of the participants to two telephone conversations (not three as per Op. Br. p. 8). There is very little essential difference in the versions. The conversations were between Mr. Garrison and Mr. Gordon Files, a member of Freston & Files, attorneys for appellee [Tr. p. 145]. Garrison told Files over the phone that he had seen the newsreel and *"felt sure* I could prove" that Lancaster had not done all of the stunts in the picture [Tr. pp. 146, 151]. He told Files of some of the scenes where "I *thought* that Mr. Lancaster didn't do his own stunts" [Tr. p. 152]. He mentioned that he had talked to Curtis—the midget—and Curtis had admitted Turner carried him upon the roof [Tr. p. 153]. Mr. Files, on his side, testified Garrison had said "he *believed* that he could prove that Mr. Lancaster had not done certain of the stunts" and that he had referred to the roof and rescue scenes [Tr. p. 188; Op. Br. p. 9]. A feeling, a thought or a belief that he could prove anything is far

from the same as proof, and proof was a condition of any of the versions of the asserted offer.

In the second phone conversation three days later, Garrison said he could prove his claim but he did not try to prove it to Files or appellee then or at any time until the trial.

He did tell Files he had a recording of a conversation with one Pomroy, in which it was admitted that it was Turner who had climbed up on the roof [Tr. p. 188] but at the trial he admitted he had no such recording [Tr. p. 154] and, as already shown, it *was* Lancaster who climbed up the roof. He also told Files he had a piece of a Dardo costume worn by Turner but admitted at the trial that he had no such thing [Tr. p. 155].

Mr. Files advised Garrison that he took the position there had been no such offer made but that, if Garrison thought there was, it was withdrawn [Tr. p. 191]. Garrison denied this statement but it was accepted by the Court. About a week later Mr. Marcus, as attorney for Garrison, wrote a letter stating Garrison had advised him, *i.e.,* Marcus, that Garrison *had* accepted the offer and had given proof [Ex. 8, Tr. p. 386] but such letter, of course, added nothing to Garrison's phone calls.

Furthermore, in such conversation, Garrison stated that what he wanted was to get back to New York for the theatrical season, and that if Files would "arrange for Warner Bros. to buy me a ticket to New York and a suit of clothes and some change to put in my pocket I will go to New York" [Tr. p. 189—see also Tr. pp. 190 and 196]

and "forget about it" [Tr. p. 196]. It is submitted, this constitutes a counter offer by Garrison and not an acceptance under any circumstances.

A qualified acceptance or a counter offer is not an acceptance but a rejection, and is really a new proposal.

Cal. Civ. Code, Sec. 1585;

Wristen v. Bowles, 82 Cal. 84 at 87, 22 Pac. 1136;

Tilley v. City of Chicago and County of Cook, 103 U. S. 155, 26 L. Ed. 374.

Although the facts relating to the asserted offer and acceptance in this case seem to dispose of the claim, it is elementary that to have an enforceable contract there must be consideration and, furthermore, there must be a real intent to contract.

In *Briggs v. Miller,* 176 Wisc. 321, 186 N. W. 163, the defendant announced or published an offer that in the event anyone at any time lost money in any of defendant's business ventures and could show the fact, the defendant would immediately pay the full loss sustained. The plaintiff, like the appellant here (Op. Br. p. 31), relied primarly upon the English case of *Carlill v. Carbolic Smoke Ball Co.,* 1 QBD 256 (cited in the opinion as 2 QBD 484) and this early case (1892) is discussed and distinguished by the Wisconsin court. It points out that in the *Carbolic* case the plaintiff, after learning of and in reliance upon the offer or warranty, purchased the device in question and used it as directed but nevertheless the device failed to perform. It is noted that defendant derived a direct benefit from the sale to the plaintiff and

that the same was true in other cases of the same class. In the *Briggs* case itself, the plaintiff did not perform any act relating to the offer other than the mere act of acceptance. Consideration for an offer of reward may often be found in an act such as proof or giving of information but the mere announcement of acceptance is not consideration. We suggest to the Court that the *Briggs* case is far closer in facts and far more persuasive than the *Carbolic* case herein.

Restatement of the Law of Contracts, Section 75, puts it that (subd. b)

> "Consideration must actually be bargained for as the exchange for the promise"

and in subdivision c it is said that

> "The fact that the promisee relies on the promise to his injury or the promisor gains some advantage therefrom, does not establish consideration without the element of bargain or agreed exchange; * * *."

a statement of the rule which is quoted in *Bard v. Kent,* 19 Cal. 2d 449 at 452.

In the case at bar, the appellant, in his two phone calls, at the very most, did nothing more than indicate a wish to accept and a belief or feeling that he could at some time or in some way prove in two indicated instances that Lancaster had not done the stunt. This is the type of act directly parallel to that involved in the *Briggs* decision *supra* and contemplated in the authorities mentioned as ineffective.

There must be, of course, as a corollary to and part of the rule with respect to consideration, an intent to contract. As Williston puts it (Williston on Contracts (Rev. Ed.), Sec. 94, Vol. I, p. 297), an offer too good

to be true cannot be snapped up and accepted so as to constitute an enforceable contract (see also *Allensworth v. Allensworth,* 239 Ky. 43, 39 S. W. 2d 198, 202; *Germain Fruit Co. v. Western Union,* 137 Cal. 598, 70 Pac. 658). And, of course, a contract is quite different from an offer to make a gift on a condition, for the latter, though looking much like the former, does not involve the intent to contract and there is no consideration (see *Graves v. Northern New York Publishing Co.,* 22 N. Y. S. 2d 537; Williston, Sec. 94). In the newsreel the dialogue twice refers to the proposal to "give away" the million.

In this connection it is, of course, the intent of the party as evidenced by act or word and not the mental impulse which is involved. It is submitted that the nature of any asserted offer or acceptance here shows there was no such intent. Appellant was himself employed on the picture and in the industry. Confined to the newsreel version, the asserted offer is of an even million dollars for proof that an actor was faking his scenes in a picture. Appellant claims the offer was to anyone who "can prove" that particular thing (App. Op. Br. p. 30), *i.e.,* not a single prize or award, but a million dollars to each claimant and so could be hundreds of times that amount. The fact that the amounts are preposterous should, we believe, be taken into consideration in interpreting the intent of the parties.

Nor is the amount involved the only thing going to the ostensible intent of either party. The newsreel showed Lancaster apparently counting a tremendous heap of money a dollar at a time as evidenced by his repetition of the digits "998-999" etc. He states, furthermore, that he had counted it three times [Ex. 6, Tr. p. 313]. As already noted, little arithmetic shows that to count a million

dollars dollar by dollar and do it three times at one second per unit, eight hours a day, seven days a week, would take in excess of three months. We doubt that appellant could have reasonably accepted any such statement as a fact, or even that the money actually being counted was money being offered. Furthermore, the literal language of the announcer's statement, which alone actually contains anything resembling an offer, must be enlarged by appellant because literally Lancaster would be doing *"his* daring stunts" if there were any of *his* daring stunts in the picture. Language, setting and amount are all, we suggest, such as to cast very serious doubts upon any possible belief of the appellant that there was a true intent to contract under or by reason of the newsreel announcement. When, as already pointed out, appellant demanded a million dollars because he believed or felt he could prove something at some time and in some way and appeared willing [Tr. pp. 189-190] to forget the whole matter for a suit of clothes, a ticket to New York and a few dollars, then the beliefs and intentions of appellant particularly may be seriously questioned.

(c) Revocation.

As heretofore noted and before appellant did anything whatever other than announce his beliefs and feelings over the telephone, he was advised by Mr. Gordon Files on behalf of the appellee that it took the position there had been no offer but, if Mr. Garrison thought there had been, it was then and there withdrawn [Tr. p. 191]. Appellant now argues that it would be impossible to withdraw or revoke an offer except by utilizing the same means in the same manner and to the same extent as for the offer in the first place (Op. Br. pp. 32-33). The authorities cited by appellant clearly show that an offer

made in a certain way may be revoked in the same way, but those authorities do not in any way indicate or even suggest that utilization of the same means is the only way. The cases cited by appellant are a recognition of the effectiveness of an implied notice, that is to say, that a person having seen the original publication would be bound by a subsequent revocation similarly published even though he had never seen or had actual notice of the revocation. The present case does not involve any implied notice whatsoever but direct and personal notice to the appellant that any offer whatsoever was withdrawn. *Shuey v. United States,* 92 U. S. 73, 23 L. Ed. 697, cited by appellant, decides that the implied notice by a similar publication was effective. The case does not involve or consider the possibility of direct personal notice to the claimant. It is the general rule of revocation mentioned in Section 41 of the Restatement rather than the permissive rule mentioned in Section 43 which is here applicable.

The remaining authorities cited by appellant are irrelevant. *Robertson v. United States,* 343 U. S. 711, 96 L. Ed. 1237 (Op. Br. pp. 31-32), is an income tax case in which the claimant had won a prize for the best symphony composed in this country. The symphony had been written in the years 1936 to 1939. The contest commenced in 1946 and the award was made in 1947. The question was the taxability of the prize as income and whether it could be spread over a period of thirty-six months. The District Court had held the award was a gift and not taxable at all. The ultimate ruling was that the payment of a prize to the winner of a contest is not a gift but is payment of a legal obligation. Although the donor of the prize required the composer to transfer a number of rights in the work to a party other than himself, it was

held that the payment was nevertheless for services rendered and would be taxable as such.

Mosley v. Stone, 108 Ky. 492, 56 S. W. 965, to take another example, is a reward case in which the offer was of a sum for the arrest of a fugitive with directions to deliver the prisoner to a specific jail. The claimant found the fugitive but the finding resulted in a gun battle in which the fugitive was wounded. He died before claimant could make physical delivery to the jailer. The ruling of the Court was that the reward was for the difficult and hazardous feat of finding and apprehending the fugitive and this had been performed.

In the first of the above cases a complete symphony had been composed and submitted. In the second case a desperate fugitive had been tracked down and apprehended after a gun battle. There is no parallel to the case here where the act of the appellant was a mere phone call or calls stating he would like the million dollars and believed he could prove certain things.

IV.

The Denial of Costs and Attorneys' Fees Claimed Under Rules 36 and 37(c) of the Rules of Civil Procedure Was Entirely Proper.

In this portion of the appeal, appellant brings up an order of the Trial Court denying his motion for attorneys' fees and costs under Rule 37(c) of the Rules of Civil Procedure [Tr. pp. 69-70]. Appellant in 1951 had requested certain admissions under Rule 36 [Tr. p. 17] and at about the same time requested answers to interrogatories [Tr. pp. 10-11]. The motion under Rule 37(c) referred to the Request for Admissions. Appellant's Opening Brief at page 44 refers to "Interrogatory No. 3." Interrogatory No. 3 and the Request for Admission

No. 3, however, generally refer to the same matter though using different terminology and hence it will be assumed that appellant is actually referring to the third Request for Admissions.

That request was for the appellee to admit that the person who ran along the *edge* of the roof carrying another person was not in fact Burt Lancaster [Tr. p. 18]. That request for that admission was refused [Tr. p. 38]. After the trial, when motion for attorneys' fees and costs was made, and in opposition thereto, Mr. Williams, one of the attorneys for appellee, made affidavit in which he said [Tr. p. 66] that in the long shot running along the crest of the roof it was not Lancaster but that in the shot along the lower edge of the same roof it was Lancaster. This is exactly what the evidence showed and is implicit in the Court's findings. The affidavit is an explanation of what might be meant by the word "edge" of the roof in appellant's third Request for Admissions. Appellant used only the word "edge," and a roof such as here concerned could be considered to have two edges, that is to say, the lower and the upper, the upper being usually referred to as the crest or peak. As the affidavit shows, it was not realized for some time that there were two such possibilities. Appellant cannot now attempt to give his own definition of what he meant by the word "edge' 'and, unless he is permitted to supply a definition now suiting his purposes, there is and was nothing in the answer of appellee to either the interrogatory or the Request for Admission which was false in any degree. Nor in any case was the matter of substantial importance, since the whole roof sequence Lancaster did do the stunts and the Court so found.

The appellant on this aspect cites two cases (Op. Br. p. 44), neither of which are related to the facts here. *Modern Food Process Co. v. Chester Packing etc. Co.,* 30 Fed. Supp. 520, simply describes the processes made available by Rules 36 and 37. Its only value here is the remark of the Court that Rule 37(c) permits a penalty in the discretion of the Court. *Metropolitan Life Insurance Co. v. Everett,* 15 F. R. D. 498, again merely describes the process and indicates that the time for making a motion under the rules in question is after proof of falsity has been established at the trial. The case does not touch any fact or issue here.

In conclusion, it is submitted that appellant has shown no reason whatever in fact or in law why the findings and judgment of the Court below are not correct or any reason why this Court should reverse either the judgment or the order below.

Respectfully submitted,

Ralph E. Lewis,
Gordon L. Files,
Eugene D. Williams,
Attorneys for Appellee.

Freston & Files,
Of Counsel.

No. 14324

United States
Court of Appeals
for the Ninth Circuit

DeANGELIS COAL COMPANY, a Co-Partnership; AMERICAN LIGNITE PRODUCTS CO., a Co-Partnership; NAZZARENO DeANGELIS, VINCENZO DeANGELIS, MARY DeANGELIS, JOSEPH DeANGELIS, FRANK DeANGELIS, Individually and as Co-Partners, Doing Business Under the Name of AMERICAN LIGNITE PRODUCTS CO.,

Appellants,

vs.

THE SHARPLES CORPORATION,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Northern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-31-54

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

WALTER K. OLDS,
57 Post Street,
San Francisco, Calif.,

Attorney for the Plaintiff and Respondent.

PIERCE DEASY,
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Jackson, California,

Attorney for the Defendants and Appellants.

In the United States District Court for the Northern District of California, Northern Division

No. 6731

THE SHARPLES CORPORATION, a Corporation,

Plaintiff,

vs.

DeANGELIS COAL COMPANY, a Copartnership; AMERICAN LIGNITE PRODUCTS CO., a Copartnership; NAZZARENO DeANGELIS, VINCENZO DeANGELIS, MARY DeANGELIS, JOSEPH DeANGELIS, FRANK DeANGELIS, Individually and as Copartners Doing Business Under the Fictitious Name and Style of DeANGELIS COAL COMPANY and Under the Name of AMERICAN LIGNITE PRODUCTS CO.; JOHN DOE COMPANY, a Corporation; RICHARD ROE COMPANY, a Corporation; FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, Individually and as Copartners Doing Business Under the Fictitious Name and Style of FIRST DOE COMPANY,

Defendants.

COMPLAINT—GOODS SOLD AND DELIVERED

Now comes the plaintiff above named and complains of the defendants above named, and for a first cause of action alleges as follows, to wit:

I.

That the plaintiff herein is a corporation incorporated under the laws of the State of Delaware. That the defendant herein, Nazzareno DeAngelis, is a citizen of the State of California, and the defendants herein, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis and Frank DeAngelis, are citizens of the State of Pennsylvania. That the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

That the true names of the defendants sued herein as John Doe Company, a corporation; Richard Roe Company, a corporation; First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, individually and as copartners doing business under the fictitious name and style of First Doe Company, are unknown to plaintiff, and said plaintiff asks leave to insert herein the true names of the said defendants in the place and stead of said fictitious names when the same become known to him, together with appropriate words to charge said defendants.

III.

That at all times herein mentioned, the defendants, Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis and Frank DeAngelis, and each of them, are copartners doing business under the fictitious name and style of DeAngelis Coal Company, and under the fictitious name and style of American Lignite Products Co.,

and the said defendants have and maintain a place of business in the City of Ione, County of Amador, State of California.

IV.

That within two years last past and next preceding the commencement of the above-entitled action, the said defendants herein, and each of them, purchased from the plaintiff herein, two machines known as Sharples Super-D-Canter Centrifuges. That the said defendants agreed to pay for each of said machines the sum of $13,545.00. That thereafter the said defendants did offer to return to the plaintiff herein one of said machines, and the said plaintiff did agree to accept the return of said machine upon payment by the said defendants herein of the sum of $3,386.25. That on or about the 22nd day of February, 1952, the said defendants herein returned to plaintiff the said machine, but ever since have failed and refused to pay the said plaintiff the sum of $3,386.25 aforementioned.

V.

That the said plaintiff has made demand upon the said defendants for the payment of said sum, but the same has never been paid, and the whole amount thereof is due, owing, and unpaid from the said defendants herein.

And for a Second, Separate and Distinct Cause of Action Against the Said Defendants, Plaintiff Complains and Alleges as Follows, to Wit:

I.

That plaintiff incorporates herein Paragraphs I, II, and III of the first cause of action hereinbefore set forth for all intents and purposes as fully as if set forth in haec verba herein.

II.

That within two years last past and next preceding the commencement of the above-entitled action, the said defendants herein, and each of them, became indebted to plaintiff for the sum of $3,386.25, as and for goods, wares and merchandise sold and delivered to the said defendants herein.

Wherefore, plaintiff prays judgment against the defendants herein, and each of them, in the sum of $3,386.25, together with interest thereon from the 22nd day of February, 1952, for plaintiff's costs of suit incurred herein, and for such other and further relief as is meet and proper in the premises.

/s/ WALTER K. OLDS,
Attorney for Plaintiff.

[Endorsed]: Filed September 20, 1952.

[Title of District Court and Cause.]

ANSWER AND COUNTER CLAIM

Now come the defendants DeAngelis Coal Company, a copartnership; American Lignite Products Co., a copartnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, individually and as copart-

ners doing business under the name of American Lignite Products Co., and, answering for themselves alone, admit, deny and allege as follows:

I.

Answering unto paragraph I, these answering defendants deny that defendants Vincenzo DeAngelis, Mary DeAngelis and Frank DeAngelis are citizens of the State of Pennsylvania but, on the contrary allege that the said named persons are citizens of the State of California.

II.

Answering unto paragraph IV of said complaint, these answering defendants admit the first and second sentences of said allegation down to and including the numerals $13,545.00 in line 30 therein. Defendants in further answer to said paragraph admit that on or about the 22nd day of February, 1952, they notified plaintiff that they, said defendants, did not and could not use said Centrifuge because of the said centrifuge not responding to the warranty of suitability for the purpose for which the machine was sold by plaintiff to defendants and for the use to which defendants were to put said centrifuge, all well known to plaintiff. That thereupon defendants did return said centrifuge to plaintiff and that on or about the 12th day of April, 1952, said plaintiff did acknowledge receipt of said centrifuge from said defendants and thereupon informed defendants that the plaintiff did issue credit to said defendants upon their account; that plaintiffs did demand of defendants in consideration of

the return of said machine the sum of $3,386.25 but that defendants refused to pay said sum or any other or different sum or any sum at all to plaintiffs in furtherance thereof and defendants did not at any of the times herein stated, or at any time, or at all, agree to pay to plaintiffs in consideration of the return of said machine the sum of $3,386.25 or any other, different, or any sum whatsoever.

III.

Answering unto paragraph V of said complaint, it is admitted that plaintiff did make demand upon defendants for the payment of said sum and that the same has never been paid but these defendants deny that the whole thereof or any part thereof or anything is due, owing and unpaid from these said defendants.

Answering Unto the Second Separate and Distinct Cause of Action, These Answering Defendants Admit, Deny and Affirm as Follows:

I.

Answering unto paragraph I of said Second Cause of Action, the defendants incorporate herein for reference, as fully as though set forth in haec verba their answer to paragraphs I, II and III of the First Cause of Action.

II.

Answering unto paragraph II of said Second Cause of Action, these answering defendants deny each and every, all and singular, the allegations therein contained.

As and for a First Affirmative Defense and Counter Claim to Said Causes of Action, These Answering Defendants Allege:

I.

That within two years last past defendants purchased from plaintiff two Model Py 14, Cylindrical Super-D-Canters and each of them was purchased based upon the said D-Canters meeting a performance result conforming to preliminary and pilot model which was conducted by plaintiff in accordance with samples and specifications for performance furnished by defendants to plaintiff; that thereupon and during the month of December, 1951, the said D-Canters were delivered to defendants by plaintiff and defendants placed one D-Canter in operation at their plant at Ione in the County of Amador, State of California; that both of said D-Canters were identical in specification; that repeated and continuing tests undertaken by defendants upon the said D-Canter placed in operation produced results not in conformity with the specification to be met by plaintiff in the operation of said D-Canters and said D-Canters and each of them was and is entirely unsuited for the work proposed to be performed by them by defendants of which plaintiff was well aware; that in furtherance of the inability of said D-Canters, or either of them, to perform according to the agreement of plaintiff and defendants, defendants thereupon and on or about the 22nd day of February, 1952, and in writing to plaintiff, rescinded their contract to

purchase said second D-Canter from plaintiff; and that thereupon and on or about the 20th day of March, 1952, defendants returned the said one D-Canter to plaintiff at its head office in Philadelphia, Pa., and thereafter and on or about the 12th day of April, 1952, plaintiff acknowledged receipt of said D-Canter; that plaintiff has since retained said D-Canter to its sole benefit. That in furtherance thereof, these defendants returned said D-Canter to said plaintiffs, freight prepaid, and they were required to and did expend as and for freight charges upon return of said D-Canter the sum of $107.44.

As and for a Second, Separate, Affirmative Defense Thereto, Answering Defendants Allege:

That the complaint of plaintiff fails to allege a cause of action against these answering defendants or either or any of them.

Wherefore, answering defendants pray that plaintiff take nothing in consequence of his said complaint and that defendants have judgment for the sum of $170.44 together with their costs of suit incurred herein and for such other and further relief as is meet and proper in the premises.

Dated this 15th day of October, 1952.

/s/ PIERCE DEASY,
Attorney for Answering
Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 17, 1952.

[Title of District Court and Cause.]

REPLY TO COUNTER CLAIM

Now comes the plaintiff, The Sharples Corporation, and for reply to the counter claim denies, generally and specifically, each and every, all and singular, the allegations of said counter claim except that plaintiff admits that within two years last past defendants purchased from plaintiff two Model Py 14, Cylindrical Super-D-Canters; that during the month of December, 1951, the said D-Canters were delivered to defendants by plaintiff and defendants placed said one D-Canter in operation at their plant at Ione, in the County of Amador, State of California; that both of said D-Canters were identical; that defendants returned said one D-Canter to plaintiff at its head office in Philadelphia, Pennsylvania, and that plaintiff thereafter retained said D-Canter.

Wherefore, plaintiff prays defendants take nothing by said counter claim, and for such other and further relief as may be meet and proper in the premises.

Dated: April 30, 1953.

/s/ WALTER K. OLDS,
Attorney for Plaintiff.

[Endorsed]: Filed April 30, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action coming on regularly to be tried before the above-entitled court on the 30th day of April, 1953, the plaintiff, The Sharples Corporation, a corporation, appearing by its attorney, Walter K. Olds, Esq., and the defendants herein, DeAngelis Coal Company, a copartnership; American Lignite Products Co., a copartnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, individually and as copartners doing business under the name of American Lignite Products Co., appearing through their attorney, Pierce Deasy, Esq., the Honorable Dal M. Lemmon, Judge of said court presiding, and thereafter witnesses being called and sworn, and evidence, both oral and documentary, being introduced, and the said matter being thereafter submitted to the court for decision, the said court being fully advised; now, therefore, the said court makes the following findings of fact and conclusions of law, to wit:

Findings of Fact

I.

That it is true that the plaintiff herein, The Sharples Corporation, a corporation, is a corporation incorporated under the laws of the State of Delaware. That it is true that the defendants herein,

Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, and Frank DeAngelis are citizens of the State of California, and that the defendant Joseph DeAngelis is a citizen of the State of Pennsylvania. That it is true that the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

That it is true that the defendants herein, Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis and Frank DeAngelis, and each of them, are copartners doing business under the fictitious name and style of DeAngelis Coal Company, and under the fictitious name and style of American Lignite Products Co., and the said defendants have and maintain a place of business in the City of Ione, County of Amador, State of California.

III.

That it is true that within two years last past and next preceding the commencement of the above-entitled action, the said defendants herein, and each of them, purchased from the plaintiff herein, two machines known as Sharples Super-D-Canter Centrifuges. That the said defendants agreed to pay for each of said machines the sum of $13,545.00. That thereafter the said defendants did offer to return to the plaintiff herein one of said machines, and the said plaintiff did agree to accept the return of said machine upon payment by the said defendants herein of the sum of $3,386.25. That on or about the 22nd day of February, 1952, the said de-

fendants herein returned to plaintiff the said machine, and agreed to pay said sum of $3,386.25 to said plaintiff. That it is true that ever since the said 22nd day of February, 1952, the said defendants have failed and refused to pay to the said plaintiff the said sum of $3,386.25.

IV.

That it is true that the said plaintiff has made demand upon the said defendants for the payment of said sum, but the same has never been paid, and the whole amount thereof is due, owing, and unpaid from the said defendants herein.

V.

That it is true that on or about the 22nd day of February, 1952, the said defendants did offer to return said machine to the plaintiff herein, and that the said defendants did return the aforesaid machine thereafter to the said plaintiff herein, and that the said plaintiff did acknowledge receipt of the same from the defendants herein. That it is true that the said machine was accepted and received solely and only upon the condition, agreement, and understanding of the defendants herein that the defendants would pay to the said plaintiff herein the sum of $3,386.25 aforementioned and no other. That the said defendants did so return said machine, and the said plaintiff did so accept said machine solely and only upon the aforesaid agreement, contract, and understanding that the said

defendants would pay the said sum to the said plaintiff herein.

VI.

That it is not true that there was any warranty of suitability for the purpose for which the said machines were sold by the plaintiff to the defendants, or that the use to which the said defendants were to put said machines were well known to plaintiff, and in that respect the said defendants did buy and purchase the aforesaid machines solely and only upon their own examination and inspection and exercise of judgment, and that the said defendants herein did not rely upon any warranty or representation of the said plaintiff herein in connection with the sale of the said machines aforementioned, but the said defendants herein did make a full and complete investigation, inspection, and test of the said machines before purchasing the same.

VII.

That it is not true that within two years last past the purchase of the said machines aforementioned was based upon the said machines meeting a performance result conforming to preliminary and pilot models which was conducted by the plaintiff in accordance with samples and specifications for performance furnished by the defendants to the plaintiff, and in that respect the said defendants acted solely upon their own volition, inspection, and investigation in purchasing the said machines, and that the said tests made with preliminary and pilot models made by the said plaintiff herein were ac-

cepted by the said defendants herein solely in connection with the exercise of their own judgment in regard thereto, and that the machines delivered did in all respects conform to and perform according to the result and tests achieved in connection with the preliminary and pilot models.

VIII.

That it is not true that repeated and continued tests or any tests undertaken by the said defendants upon one of the said machines when placed in operation produced results not in conformity with the specifications to be met in the operation of said machine and that said machines did perform in conformity with the specifications to be met by the said plaintiff in connection with the said machines. That it is not true that the said machines, and each of them, were unsuited for the work proposed to be performed by them by defendants, of which plaintiff was well aware. That it is true that the said defendants returned the said machine to the plaintiff herein, and that the plaintiff acknowledged receipt of the same, but that the said machine was accepted by the said plaintiff and retained for the benefit of the plaintiff solely and only in accordance with the agreement and understanding that the said defendants herein would pay to the said plaintiff herein the sum of $3,386.25. That it is true that the defendants herein expended freight charges upon the return of said machine, but the said freight charges so expended were solely for the benefit of

the said defendants herein and the said plaintiff never agreed to pay or assume the same.

And From the Foregoing Findings of Fact, Said Court Makes the Following:

Conclusions of Law

I.

That at all times herein mentioned, the defendants, Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis and Frank DeAngelis, and each of them, are copartners doing business under the fictitious name and style of DeAngelis Coal Company, and under the fictitious name and style of American Lignite Products Co., and the said defendants have and maintain a place of business in the City of Ione, County of Amador, State of California.

II.

That the said defendants herein did agree to pay to and became indebted to the said plaintiff herein for the sum of $3,386.25 as of the 22nd day of February, 1952.

III.

That the said plaintiff has made demand upon the defendants for the payment of said sum, but the same has never been paid, and the whole amount thereof is due, owing, and unpaid from the said defendants herein.

IV.

That the said plaintiff is entitled to have judgment upon its complaint in favor of the said plain-

tiff herein against the defendants herein in the sum of $3,386.25, together with interest thereon at the legal rate of 7% from the 22nd day of February, 1952.

V.

That the said defendants herein are entitled to nothing by way of counterclaim herein.

Let judgment be entered accordingly.

Dated: January 12, 1954.

/s/ DAL M. LEMMON,
Judge of the District Court.

Lodged January 1, 1954.

[Endorsed]: Filed January 12, 1954.

In the United States District Court for the Northern District of California, Northern Division

No. 6731

THE SHARPLES CORPORATION, a Corporation,

Plaintiff,

vs.

DeANGELIS COAL COMPANY, a Copartnership; AMERICAN LIGNITE PRODUCTS CO., a Copartnership; NAZZARENO DeANGELIS, VINCENZO DeANGELIS, MARY DeANGELIS, JOSEPH DeANGELIS, FRANK DeANGELIS, Individually and as Copartners Doing Business Under the Fictitious Name and Style of DeANGELIS COAL COMPANY and Under the Name of AMERICAN LIGNITE PRODUCTS CO., JOHN DOE COMPANY, a Corporation; RICHARD ROE COMPANY, a Corporation; FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, Individually and as Copartners Doing Business Under the Fictitious Name and Style of FIRST DOE COMPANY,

Defendants.

JUDGMENT

The above-entitled action coming on regularly to be tried before the above-entitled court on the 30th day of April, 1953, the plaintiff, The Sharples Corporation, a corporation, appearing by its attorney,

Walter K. Olds, Esq., and the defendants herein, DeAngelis Coal Company, a copartnership; American Lignite Products Co., a copartnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, individually and as copartners doing business under the name of American Lignite Products Co., appearing through their attorney, Pierce Deasy, Esq., the Honorable Dal M. Lemmon, Judge of said court presiding, and thereafter witnesses being called and sworn, and evidence, both oral and documentary, being introduced, and the said matter being thereafter submitted to the court for decision, the said court being fully advised, and the court having heretofore made and entered herein its Findings of Fact and Conclusions of Law, now, therefore:

It Is Hereby Ordered, Adjudged and Decreed that the said plaintiff, The Sharples Corporation, a corporation, have and recover of the defendants, DeAngelis Coal Company, a copartnership; American Lignite Products Co., a copartnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, individually and as copartners doing business under the name of American Lignite Products Co., the sum of $3,386.25 principal, $439.81 interest, together with plaintiff's costs in the sum of $.....

It Is Further Ordered that the said defendants herein take nothing by way of counterclaim or offset against the said plaintiff herein.

Dated: January 12, 1954.

/s/ DAL M. LEMMON,
Judge of the District Court.

Lodged January 1, 1954.

[Endorsed]: Filed January 12, 1954.

Entered January 14, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that defendants DeAngelis Coal Company, a copartnership; American Lignite Products Co., a copartnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, individually and as copartners doing business under the name of American Lignite Products Co., hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on January 14, 1954.

/s/ PIERCE DEASY,
Attorney for Appealing Defendants.

Dated this 11th day of February, 1954.

[Endorsed]: Filed February 13, 1954.

[Title of District Court and Cause.]

POINTS UPON WHICH APPELLANTS INTEND TO RELY UPON APPEAL

The following are the points upon which the appellants intend to rely upon this appeal:

1. That plaintiff's complaint was fatally defective in not having pleaded, nor furnished proof thereof, of damages resulting from the failure of defendants to accept and pay for the goods sold from plaintiff to defendants; and

2. That the correct measure of damages is the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted.

Dated this 29th day of March, 1954.

/s/ PIERCE DEASY,
Attorney for Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 31, 1954.

In the District Court of the United States for the Northern District of California, Northern Division

No. 6731

THE SHARPLES CORPORATION, a Corporation,

Plaintiff,

vs.

DeANGELIS COAL CO., a Copartnership; AMERICAN LIGNITE PRODUCTS CO., a Copartnership; NAZZARENO DeANGELIS, VINCENZO DeANGELIS, MARY DeANGELIS, Doing Business as AMERICAN LIGNITE PRODUCTS CO., et al.,

Defendants.

Thursday, April 30, 1953

Wednesday, November 24, 1953

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:

WALTER K. OLDS, ESQ.

For the Defendants:

PIERCE DEASY, ESQ.

* * *

Mr. Olds: If your Honor please, it is my belief that the first count does state a cause of action in Paragraph 4, wherein it is alleged that the Defendants did offer to return to the Plaintiff herein one of said machines, and said Plaintiff did agree to accept the return of said machine upon payment by the said Defendants herein of the sum of three thousand and some odd dollars, that that states a contract, a modification of the original contract of purchase, and that is a supplemental, secondary contract that came into being.

The Court: Well, there is no allegation of any promise by the Defendants to pay the sum of $3,386.00.

Mr. Olds: If that be considered to be a defect, is there any reason why I may not ask your Honor to permit to amend to include in the allegation——

The Court: You can ask to amend anything, of course.

Mr. Olds: Well, it seems to me it is a reasonable request to be granted.

The Court: Well, I think so.

Mr. Olds: May it be considered that in paragraph 4, we have alleged that they agreed to pay that amount, namely, $3,386.25?

The Court: We are very liberal in permitting amendments to the pleadings in this Court in furtherance of justice, and I will permit you to amend to allege that the defendants agreed to pay the sum of $3,386.25 upon—— [5*]

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Olds: Thank you, your Honor.

The Court: Return of the machine.

Mr. Olds: I did feel, too, that the matter would be taken care of by the common count, which is the second cause of action.

The Court: Call your first witness.

* * *

[Endorsed]: Filed September 8, 1954. [6]

PLAINTIFF'S EXHIBIT No. 1

August 1, 1951.

Sharples Corporation,
2300 West Moreland Street,
Philadelphia, Pennsylvania.

Att: Mr. Ted Armstrong,
Sales Department.

Gentlemen:

In accordance with our verbal understanding, please find enclosed our purchase order covering purchase of two Sharples PY-14 Cylindrical Super-D-Canters. These machines are to be fitted with vapor-sealed fittings, constructed of stainless steel, and the conveyors are to be treated with Hasteloy in order to harden the surface of the conveyors.

It is understood that the price of these machines will be $12,045 each, with an additional $1,500 al-

lowance for the hard surfacing of the feed zone impeller and conveyor.

It is understood that our final acceptance of these machines will be subject to results of full scale pilot plant tests to be conducted by the Sharples Corporation with material which we will supply. We are arranging in this regard to promptly forward to yourselves in Philadelphia, 200 gallons of solvent identical to a type being used in our plant here and 300 lbs. of lignite ground to a mesh size comparable with our plant practice. These we wish you to react under established temperature and stirring conditions. We will hold retaining samples of both solvent and lignite.

It is understood that dependent upon the outcome of these tests, we will place our final acceptance and confirmation of the enclosed purchase order. In regard to priorities we ask that you keep in contract with Mr. Joseph DeAngelis of the DeAngelis Coal Company, Box 338, Carbondale, Pennsylvania. We understand that there will be forthcoming an NPA delivery order to the Sharples Corporation specifying our priority.

I would like at this time to thank you and Mr. Tom Close for your co-operation and assistance in conducting preliminary tests at your plant in Philadelphia.

Yours very truly,

AMERICAN LIGNITE
PRODUCTS COMPANY,

/s/ R.M.R.

R. M. ROBERTS.

RMR/emg

Enclosure

cc: Sharples Corporation,
Att: Mr. Griffin,
686 Howard Street,
San Francisco, California.

Mr. Joseph DeAngelis,
P. O. Box 338,
Carbondale, Pennsylvania.

Received August 2, 1951.

[Endorsed]: Filed April 30, 1953.

PLAINTIFF'S EXHIBIT No. 2

September 28, 1951.

Air Mail.

American Lignite Products Company,
Ione, California.

Attention: Mr. F. J. DeAngelis.

Gentlemen:

Confirming our recent telephone conversation, we will not delay shipping your Super-D-Canters until we find a satisfactory material of which we can make gaskets and seals for these machines. The machines will be shipped to you with our standard

gaskets and seals which are made of a Buna compound. We are currently conducting tests here, inasmuch as we still have some solvent left after running your tests, to determine what material is best suited for your application. In the absence of any specific data, it appears that Teflon may prove to be the best material. Should this be true, the cost of Teflon seals over and above the cost of our standard seals must be passed on to you.

Since talking with you on the phone, it now appears that we may be able to get you one (1) Super-D-Canter somewhat sooner than we could get you two (2) together. As soon as I have something definite on this, I will advise you.

Incidentally, we are proceeding on the basis that your order is firm although we have not received an addendum to your original order so stating.

Will you please send us this addendum at your earliest convenience?

Very truly yours,

THE SHARPLES CORPORATION,
Sales Department.

cc: Mr. R. M. Roberts.

[Endorsed]: Filed April 30, 1953.

PLAINTIFF'S EXHIBIT No. 3

American Lignite Products Company
Division
DeAngelis Coal Co.
Carbondale, Pa.
Ione, California

Air Mail.

October 9th, 1951.

Sharples Corporation,
2300 Westmoreland Street,
Philadelphia 40, Pa.

Attention: Mr. T. R. Armstrong.

Gentlemen:

We acknowledge your letter of September 28th, together with the enclosed reports outlining tests conducted with lignite supplied by ourselves and reacted with solvents as outlined in your report.

This letter will serve as confirmation of our order dated August 4th, 1951, for two Sharples Super-D-Canter Centrifuges.

Our confirmation of this order is based upon the performance results submitted to us, particularly the experiment work described under Test No. 1 of the above report. It is our understanding that these machines will duplicate the results quoted in this test under similar conditions.

Very truly yours,

AMERICAN LIGNITE
PRODUCTS CO.

/s/ R. M. ROBERTS.

RMR:hvw

cc: Mr. T. J. Griffin,
Sharples Corp., S. F.

[Stamped]: Sales Dept., Oct. 11, Rec'd.

[Endorsed]: Filed April 30, 1953.

PLAINTIFF'S EXHIBIT No. 4

Air Mail.

November 21, 1951.

Mr. F. J. DeAngelis,
American Lignite Products Company,
Ione, California.

Dear Mr. DeAngelis:

I have your letter of November 13th, concerning your order with us and I think a review of the circumstances surrounding this order is necessary so that we will have a common understanding of this problem which I think does not exist at the present time.

The chronology of the events which I have is as follows. On July 26th, we ran a test in our Laboratory on some small equipment and the results were

Plaintiff's Exhibit No. 4—(Continued)

satisfactory to Mr. Roberts who witnessed the tests and who wanted to place an order immediately for two larger machines with a guarantee on our part to equal the tests. This we could not do for obvious reasons. Our position being that before making a guarantee we would have to run a full scale test on the actual equipment which would be delivered to you. In the meantime, however, you gave us an order based upon the supposition that these full scale tests would bear out the laboratory tests referred to above.

We require a minimum of seven months to build Super-D-Canters with hard surfaced conveyors. Our discussion with your organization disclosed that such a length of time would work a hardship on you and, therefore, we decided to divert another order which we had in our Production Department for another customer over to your company and stated that by doing this we could make delivery in approximately four months.

Therefore, by giving you another customer's equipment by November 26th, we would be living up to our accelerated delivery date of four months.

You have now been advised that shipment will be made by November 30th, which is only a few days over the deadline. I have checked with our Production Department before writing this letter and they tell me that the first machine is scheduled for ship-

Plaintiff's Exhibit No. 4—(Continued)

ment on November 28th, and the second unit on December 14th.

At one time it appeared that we might move this delivery up to better than four months, in accordance with Mr. Armstrong's letter of November 2nd to Mr. Roberts. However, a mishap in our production made this impossible and on November 9th, Mr. Armstrong wrote you stating that we would have to revert to our original delivery date of four months which would be November 29th or 30th. As a matter of fact, that would make it four months and four days.

Your Mr. Connelly discussed this delivery problem with Mr. Costigan, Manager of our New York Office, on August 14th and Mr. Costigan told Mr. Connelly that we could not improve upon our original delivery promise.

On August 16th, Mr. Armstrong wrote to you and reiterated the original delivery date of four months.

On September 29th, Mr. Roberts telephoned Mr. Armstrong and at that time Mr. Armstrong advised him that the delivery date would be as originally scheduled—four months.

We then had a letter from you dated September 29th, asking us to improve upon this delivery and on October 4th, Mr. Armstrong wrote to Mr. Griffin, Manager of our San Francsico Office, asking him to go and personally discuss this delivery problem

Plaintiff's Exhibit No. 4—(Continued)

with you and acquaint you with our problem and tell you that our efforts to make a shorter delivery than four months were unsuccessful.

One other pertinent thing that should be mentioned is that while the original tests were run on July 26th, it was not until September 24th, that we ran the full scale tests which were successful and on which date we considered we had a bona fide order and could make the required performance guarantees.

We regret the misunderstanding as well as the expense which your company has been put to in operating without this equipment. However, machinery of this particular type takes a long time to build and while four months seems intolerable to you it really is unusual performance from a production standpoint.

In the event that your understanding of the details outlined in this letter vary from mine, I'd appreciate hearing from you. In the meantime this order will have my personal attention and if we can ship the first machine or the second machine any sooner than the present schedule of November 28th and December 14th, respectively, we will certainly do so.

My kind regards to you and I shall look forward with pleasure to meeting you soon when I am on the West Coast.

Plaintiff's Exhibit No. 4—(Continued)

Sincerely yours,

THE SHARPLES CORPORATION,

....., President.

G. J. KEADY
-fel-

cc: Mr. J. T. Costigan-New York.
Mr. P. T. Sharples-Phila.
Mr. T. J. Griffin-San Francisco.
Mr. C. E. Printz-Phila.

[Endorsed]: Filed April 30, 1953.

PLAINTIFF'S EXHIBIT No. 5

American Lignite Products Company
Division
DeAngelis Coal Co.
Carbondale, Pa.
Ione, California

January 16th, 1952.

Mr. G. J. Keady, President,
Sharples Corporation,
2300 Westmoreland Street,
Philadelphia, Pa.

Dear Mr. Keady:

We returned your first billing invoice for one Sharples Super-D-Canter. This was returned as it

was requested by our auditor that the ESA stamp of approval appear on the face of the invoice. Considering that an unreasonable length of time has elapsed since we mailed this invoice back to your billing department, we are wondering if we stepped out of line in making this simple request. If in any way our request for the ESA stamp is objectionable, please inform us and we will act accordingly.

I know you are interested to hear about the two PY-14 Super-D-Canters. One has been installed since December 17th, 1951, and has been operating ever since. The other is being held in storage and will not be put to work until we can, in some way, operate the present one with efficiency. From everything which we have learned so far, it appears that centrifugation does not afford a better process when compared with filtration. The only favorable point is that we will have a larger capacity, but this doesn't help as the effluent contains insolubles which are so fine that it is virtually impossible to eliminate them by centrifugation or filtration. We have tried everything possible with no apparent success. We would appreciate any advice you might have to offer concerning the elimination of these very fine insolubles which are present in the effluent from the PY-14 Super-D-Canter.

From a great number of tests utilizing the super-centrifuges in conjunction with the effluent from the PY-14, we are convinced that the super-centrifuges will not give us the desired product. Every type of solution which we have passed through the super-

centrifuges resulted to a final extract of wax which is not saleable.

Much thanks for your personal interest.

Very truly yours,

AMERICAN LIGNITE
PRODUCTS CO.,

/s/ FRANK J. DeANGELIS.

FJDeAngelis:hvw

[Endorsed]: Filed April 30, 1953.

PLAINTIFF'S EXHIBIT No. 6

American Lignite Products Company
Division
DeAngelis Coal Co.
Carbondale, Pa.
Ione, California

February 22nd, 1952.

Air Mail.

Mr. D. J. Keady, President,
Sharples Corporation,
2300 Westmoreland Street,
Philadelphia, Pa.

Dear Mr. Keady:

We wrote you on January 22nd requesting your comment on the two alternatives which we outlined in our letter. To date we have not heard from you

in this regard. However, it is just as well as we have now reached a more definite state of mind.

Since writing our letter of January 22nd, we have striven to put the Super-D-Canter PY-14 to some type of work which would be of benefit to us. Unfortunately, no matter which condition we tried, we were unable to obtain satisfactory results. We are at a complete loss to approach the situation any further and it appears necessary that we will have to return the one Super-D-Canter PY-14 which is still in its original crate and has been held in storage since the day we received it.

May we ask you therefore to give us your written permission to return it, as well as furnish shipping instructions. Shipment will leave here as you indicate, prepaid.

We are indeed regretful that your type of centrifuge cannot be successfully fitted to our process. As mentioned in past correspondence, there are certain advantages to centrifugation which would pay off appreciably and which we would like to retain. However, the finished product is so badly contaminated it is completely unmarketable.

Unless you can furnish us with competent engineering which will successfully adapt the PY-14, we would be reluctant to try any further experimental work on our own as we feel that we have attempted every possible condition without satisfactory results.

We would like to hear from you at your earliest convenience.

Very truly yours,

AMERICAN LIGNITE
PRODUCTS CO.

/s/ FRANK J. DeANGELIS.

FJDeAngelis:hvw

[Endorsed]: Filed April 30, 1953.

PLAINTIFF'S EXHIBIT No. 7

March 5, 1952.

Air Mail.

Mr. F. J. DeAngelis,
American Lignite Products Company,
Ione, California.

Subject: Sales Order M-7553.

Dear Mr. DeAngelis:

I have discussed your letter of February 22nd with Mr. Keady, and he has asked me to reply.

We will accept the return of the last Super-D-Canter which we shipped to you, if this machine has not been used, and at a cancellation charge of 25% of the price of the machine.

You purchased these two machines on the basis of full scale tests which were run, and which were satisfactory to you. I am quite sure that when

operating on material which is identical with that which you submitted for tests, that the Super-D-Canter will perform in exactly the same manner as indicated in the test report. As a consequence, we feel no responsibility for changes in your processes, or in your set-up which makes the results of this machine unsatisfactory to you at the present time.

Upon receipt of your firm order, we procceded to manufacture this unit, and we experienced irrecoverable costs. It is our expectation that you will reimburse us for these costs, and this is the basis of the cancellation charge of 25%. The charge of 25% is somewhat less than our normal charges in cases of this nature, and I assume that you will find it acceptable.

Very truly yours,

THE SHARPLES CORPORATION,

....., Vice President.

C. E. Printz
-meh-

[Endorsed]: Filed April 30, 1953.

PLAINTIFF'S EXHIBIT No. 8

American Lignite Products Company
Division
DeAngelis Coal Co.
Carbondale, Pa.
Ione, California

March 14th, 1952.

Sharples Corporation,
2300 Westmoreland Avenue,
Philadelphia, Pa.

Attention: C. E. Printz.

Gentlemen:

In response to your letter of March 5th, we wish to advise that we will keep a direct answer in abeyance pending an exchange of correspondence between our respective offices.

You can expect to hear from us within a short time.

We wish to advise you that the performance of the PY-14 Super-D-Canter was directly contingent on the performance of the Super Centerfuge which was supposed to clarify the effluent from the PY-14 to the expected results shown in your Laboratory Report No. 86686, Part 2.

We have simulated this condition, as well as many other conditions, without ever obtaining results to approach what you have shown.

In any event, we will write you in detail as soon as possible.

Very truly yours,

AMERICAN LIGNITE PRODUCTS CO.,

/s/ FRANK J. DeANGELIS.

FJDeAngelis:hvw

[Endorsed]: Filed April 30, 1953.

PLAINTIFF'S EXHIBIT No. 9

April 7, 1952.

American Lignite Products Co.,
Division of DeAngelis Coal Co.,
Carbondale, Pennsylvania.

Gentlemen:

To date we have not received your check to offset our invoice 1151-1268 dated November 30, 1951, in the amount of $13,545.00. This invoice is now considerably past due our regular terms of net 30 days.

May we have your check by return mail to close out this past due account or may we hear from you as to why payment is being withheld.

Very truly yours,

THE SHARPLES CORPORATION,

A. SMALETZ,
Credit Manager.

PLAINTIFF'S EXHIBIT No. 10

American Lignite Products Company
Division
DeAngelis Coal Co.
Carbondale, Pa.
Ione, California

April 14, 1952.

The Sharples Corporation,
2300 Westmoreland Street,
Philadelphia 40, Pennsylvania.

Attention: Mr. A. Smaletz.

Gentlemen:

Your letter of April 7 addressed to our Carbondale address has been sent directly to us for our attention.

By now you have probably received the return of the PY-14 Super-D-Canter. Perhaps this will answer your question as to why you have not received our check to offset the charges which you questioned in your letter.

As soon as you have processed a credit memorandum for the return of this equipment, kindly send this in duplicate to the above address in order that our records can be adjusted.

It is indicated in one of your recent letters that if we were to return this equipment we would have to pay a 25% service charge. We wish to advise you that we definitely will not accept this service

charge, as your equipment failed to perform as your laboratory guaranteed.

Yours very truly,

AMERICAN LIGNITE
PRODUCTS COMPANY,

/s/ FRANK J. DeANGELIS.

FJDeAngelis:ta

PLAINTIFF'S EXHIBIT No. 11

April 23rd, 1952.

Mr. F. J. DeAngelis,
American Lignite Products Company,
Ione, California.

Subject: Our Sales Order M-7553.

Dear Mr. DeAngelis:

I have your letter of April 14th which was addressed to Mr. Smaletz. In this letter you indicate a definite refusal to recognize what we consider to be a fair and just return charge.

Once again I want to point out that we proceeded to manufacture this unit upon the basis of an order received from you, and we experienced costs which are irrecoverable. There is no indication, nor have you given us any definite data which would support your statement that this equipment failed to perform satisfactorily. In the first place, our labora-

tory guaranteed nothing except to duplicate the performance obtained here in the laboratory when operating on the same material. Since this machine is a duplicate of the laboratory machine, there is just no doubt in my mind that it will produce the same performance.

An invoice will be issued for a cancellation charge, in the amount of 25%, and we will expect you to honor this invoice.

Very truly yours,

THE SHARPLES
CORPORATION,

....,
Vice President.

C. E. Printz
-meh-

c.c. Mr. A. Smaletz

[Endorsed]: Filed April 30, 1953.

PLAINTIFF'S EXHIBIT No. 12

American Lignite Products Company
Division
DeAngelis Coal Co.
Carbondale, Pa.
Ione, California

December 12, 1951.

Mr. G. J. Keady, Pres.
Sharples Corporation,
2300 Westmoreland St.,
Philadelphia 40, Pa.

Dear Mr. Keady:

The facts contained in your letter of November 21st are mainly correct. There are a couple of points open to question, however, but rather than debate the pros and cons, let's simply drop the matter.

We are pleased to inform you that shipment of the first centrifuge was received on Monday, December 10th, exactly on schedule. Installation is nearly completed and it will only be a matter of a few days more till we are able to start first run tests. Of course your San Francisco engineer will be here to witness the first trial runs.

We wish to take this opportunity to thank you for your fine cooperation in supplying this equipment for us. We realize what you are up against in trying to meet customer's demands and there is no

doubt you have many pressing problems. Speaking for ourselves, frankly we are quite pleased over everything.

As indicated in your closing paragraph, I, too, shall look forward with pleasure to meeting you when you visit our area, and I wish to express our appreciation for your personal interest in our order.

Very truly yours,

AMERICAN LIGNITE
PRODUCTS CO.,

/s/ FRANK J. DeANGELIS.

FJDeAngelis:hvw

[Endorsed]: Filed April 30, 1953.

DEFENDANT'S EXHIBIT D

[Postcard]

[Front]

[Cancelled 2 cent stamp.]

[Postmarked]: Philadelphia, Pa., Apr. 17, 1952, 8:00 p.m.

[Addressed to]: American Lignite Products,
Ione, Calif.

[Back]

The Sharples Corporation
2300 Westmoreland Street
Philadelphia 40, Pa.

This is to acknowledge receipt of 1 PY-14-1387 complete with spares and tools from you on 4-16-52.

This equipment will be inspected and

☐ An estimate of repair costs and delivery will be forwarded for your approval.

☒ A credit will be issued to your account.

☐ We will repair and return to you per your instructions.

☐ Please advise reason for material return.

Our repair order No. R-981. Your order No. ....

W. F. CAMPBELL,
Manager Service & Repair Department.

[Endorsed]: Filed April 30, 1953.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated.

Complaint.
Answer and Counterclaim.
Reply to Counterclaim.
Findings of Fact and Conclusions of Law.
Judgment.
Notice of Appeal.
Cost Bond on Appeal.
Points Upon Which Appellants Intend to Rely Upon Appeal.
Designation of Portions of the Record.
Order Extending Time to Docket Appeal.
Plaintiff's Exhibits 5, 6, 7, 8, 9, 10, 11.
Defendants' Exhibit D.

In Witness Whereof I have hereunto set my hand and the seal of said Court this 21st day of April, 1954.

C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below are the originals filed in this Court in the above-entitled case and that they constitute the Supplemental Record on Appeal as designated by the parties.

Plaintiff's Exhibits 1, 2, 3, 4 and 12.

Defendants' Exhibits A, B and C.

One (1) Volume Reporter's Transcript.

Designation of Additional Portions of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 8th day of September, 1954.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSEN,
Deputy Clerk.

[Endorsed]: No. 14324. United States Court of Appeals for the Ninth Circuit. DeAngelis Coal Company, a Co-Partnership; American Lignite Products Co., a Co-Partnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, Individually and as Co-Partners, Doing Business Under the Name of American Lignite Products Co., Appellants, vs. The Sharples Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed April 22, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,324

DeANGELIS COAL COMPANY, et al.,

Appellants,

vs.

THE SHARPLES CORPORATION,

Appellee.

STATEMENT OF APPELLANT ADOPTING THE STATEMENT AND DESIGNATION APPEARING IN THE TYPEWRITTEN RECORD

Pursuant to Rule 17 (6) of the Rules of Practice of the above-entitled Court, Appellant hereby adopts for purposes of this Appeal its designation of the record and statement of points upon which Appellants intend to rely upon this Appeal as appears in the typewritten record docketed from the District Court of the United States, Northern District of California, Northern Division.

/s/ PIERCE DEASY,
Attorney for Appellants.

[Endorsed]: Filed May 1, 1954.

No. 14,324

IN THE

United States Court of Appeals

For the Ninth Circuit

DeAngelis Coal Company, a Co-Partnership; American Lignite Products Co., a Co-Partnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, Individually and as Co-Partners, doing business under the name of American Lignite Products Co.,

Appellants,

vs.

The Sharples Corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' OPENING BRIEF.

Deasy and Deasy,
By Pierce Deasy,
10 Court Street, Jackson, California,
Attorneys for Appellants.

Pernau-Walsh Printing Co., San Francisco

Subject Index

Table of Authorities Cited

Cases

Codes

Texts

No. 14,324

IN THE

United States Court of Appeals

For the Ninth Circuit

DeAngelis Coal Company, a Co-Partnership; American Lignite Products Co., a Co-Partnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, Individually and as Co-Partners, doing business under the name of American Lignite Products Co.,

Appellants,

vs.

The Sharples Corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

APPELLANTS' OPENING BRIEF.

STATEMENT OF JURISDICTIONAL FACTS.

Appellee is a corporation incorporated under the laws of the State of Delaware, (T.R. 4) and that appellants, save and except Joseph DeAngelis, are citi-

zens of the State of California (T.R. 13), and the amount in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. (T.R. 13.)

STATEMENT OF THE CASE.

This is an appeal from a judgment of the District Court of the United States, Northern District of California, Northern Division, awarding damages to appellee in the sum of $3386.25, plus interest and costs, resulting from the return by the appellants, and acceptance by appellee of certain machinery theretofore sold by appellee to appellants. The complaint, Par. IV, (T.R. 5), which was the charging paragraph, recited the purchase of the machinery by appellants for the sum of $13,545.00, and that "Defendants (Appellants herein) did thereafter offer to return to the Plaintiff said machinery, and the Plaintiff did agree to accept the return of said machine upon payment by the said Defendants of the sum of $3386.25. That on or about the 22nd day of February, 1952, the said Defendants herein returned to Plaintiff the said machine, but ever since have failed and refused to pay the said *Plaintiff* the sum of $3386.25 . . ."

Defendants' denial, Answer, Par. II, (T.R. 7) joined issue.

Paragraph III of the findings of fact, (T.R. 13) adopted the allegation of said complaint, holding that appellants did, in fact, on or about the 22nd day of February, 1952, return the machine and agreed to pay

the sum of $3386.25 to appellee. Paragraph II of the conclusions of law (T.R. 17) contains this language:

> "That the said Defendants herein did agree to pay and became indebted to the said Plaintiff herein for the sum of $3386.25 as of the 22nd day of February, 1952."

The following points are involved:

1. That the findings of fact and conclusions of law in the particulars noted upon which the judgment is grounded are not supported by the evidence;

2. That there was but one contract of sale between the parties, and that, upon breach thereof by the buyer (appellant), the seller's (appellees) remedy was limited to a pleading and proof of damages resulting from the failure of the buyer to retain and pay for the subject matter of such sale;

3. That, in law, there was no second or subsequent contract between the parties wherein, or otherwise, the seller could unilaterally assess a penalty or liquidated damage, and that, a judgment, grounded upon findings of fact and conclusions of law contrary thereto finds no support in the evidence or in law.

STATEMENT OF FACTS.

Defendants, DeAngelis Coal Company, et al., purchased from plaintiff, The Sharples Corp., two machines known as Sharples Super-D-Canter PY-14 Centrifuges and agreed to pay for each of said

machines the sum of $13,545.00. Shipment of the first centrifuge was received by defendants on December 10, 1951. This machine was assembled, tested for many weeks, but was found not to give satisfactory results. The performance obtained by defendants did not approximate prior laboratory tests upon which the contract was predicated. Therefore defendants, upon subsequent receipt of the second centrifuge, left it crated and on February 22, 1952, after the operation had continued in an unsatisfactory manner for over two months, stated to plaintiff that the machine would have to be returned. Plaintiff replied on March 5, 1952, to the effect that there would be a 25% "cancellation charge" upon return of the crated centrifuge. As stated in correspondence on that date, (Plaintiff's Exhibit No. 7, TR pp. 38-39), such "cancellation charge" by plaintiff was to reimburse plaintiff for "irrecoverable costs" in the manufacture of the unit in question. No other justification for the charge has at any time been made.

Defendants next communicated with plaintiff on March 14, 1952, (Plaintiff's Exhibit No. 8, TR pp. 40-41) to the effect that the matter would be taken under advisement pending further correspondence between the parties.

On March 20, 1952, the centrifuge was sent by defendants to plaintiff with freight charges prepaid by defendants. On April 14, 1952, defendants wrote plaintiff that "we definitely will not accept this service charge, as your equipment failed to perform as

your laboratory guaranteed." (Plaintiff's Exhibit No. 10, TR pp. 42-43.)

On April 17, 1952, a postcard from plaintiff acknowledged receipt of the centrifuge in question. (Defendants' Exhibit D, TR pp. 46-47.) Since that date defendants have refused to pay plaintiff any consideration for the attempted rescission of the contract of sale. Since that date plaintiff has had complete ownership of said centrifuge.

Defendant has made full payment for the first Super-D-Canter even though such machine has been of no discernable value to defendant.

ARGUMENT.

I. PLAINTIFF'S COMPLAINT WAS FATALLY DEFECTIVE IN NOT HAVING PLEADED, NOR FURNISHED PROOF THEREOF, OF DAMAGES RESULTING FROM THE FAILURE OF DEFENDANTS TO ACCEPT AND PAY FOR THE GOODS SOLD FROM PLAINTIFF TO DEFENDANTS.

It is a cardinal principle of the law that damages resulting from breach of a contract of sale must be both alleged and proved. Plaintiff has alleged the sale of the machine, known as a Sharples Super-D-Canter PY-14 Centrifuge, to defendants and has acknowledged return of it without any payment being made by defendants. However, plaintiff's complaint is totally devoid of any allegation of resultant damage because of defendants' attempted rescission of the contract of sale.

The machine in question was never uncrated by defendants. After many bona fide attempts by defendants to make advantageous use of the first delivered centrifuge, it became apparent to defendants that successful laboratory tests, upon which the sale of the machine had been predicated, could not be approximated. It therefore became necessary for the defendants to return the crated centrifuge. Freight charges for its return were assumed by the defendants.

The Sharples Super-D-Canter is a standard article catalogued for sale by the plaintiff. (TR p. 123, line 8.) Plaintiff did not allege what disposition was made of this standard article upon its return. If plaintiff was able to resell the machine in question at its quoted price, could there be resultant damage to plaintiff because of the attempted rescission of the contract of sale?

Plaintiff has attempted to explain the "cancellation charge" of 25% of the purchase price of the unit which it prays to exact as an amount necessary to reimburse plaintiff for "irrecoverable costs" in its manufacture. (TR pp. 38-39.)

> ". . . upon receipt of your firm order, we proceeded to manufacture this unit, and we experienced irrecoverable costs. It is our expectation that you will reimburse us for these costs, and this is the basis of the cancellation charge of 25%. The charge of 25% is somewhat less than our normal charges in cases of this nature, and I assume you will find it acceptable, . . ."

Such costs in the manufacture of a standard item, even if alleged and proven, are not properly includable in the determination of the measure of damages.

> ". . . No person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides, . . ."
>
> *Calif. Civil Code,* Section 3358.

II. THE CORRECT MEASURE OF DAMAGES FOR BREACH OF A CONTRACT OF SALE IS THE DIFFERENCE BETWEEN THE CONTRACT PRICE AND THE MARKET PRICE OR CURRENT PRICE AT THE TIME OR TIMES WHEN THE GOODS OUGHT TO HAVE BEEN ACCEPTED.

Damages are awarded in actions for breach of a contract to give the injured party benefit of his bargain and, in so far as possible, to place him in the same position he would have been in had the promissor performed the contract.

> *Calif. Civil Code,* Section 3300;
>
> *Coughlin v. Blair,* 41 Cal. 2d 587, 262 P. 2d 305 (1953).

This time-worn rule as to the recovery of damages from the breach of a contract of sale is exact as well as fair and practical in its application. A seller of goods is thus protected against loss if the prospective buyer will not accept or retain such items and therefore further sale is necessitated.

III. CONTRARY TO THE FINDINGS OF FACT AND THE CONCLUSIONS OF LAW REACHED BY THE LOWER COURT, DEFENDANTS DID NOT CONTRACT WITH PLAINTIFF AS OF THE TWENTY-SECOND DAY OF FEBRUARY, 1952, OR AT ANY OTHER DATE, TO INCUR A 25% "CANCELLATION CHARGE" INCIDENT TO RETURN OF THE UNIT IN QUESTION.

The finding of a contract incident to return of the centrifuge has neither support in law nor the facts as found. A chronological review of relative correspondence between the parties is necessary at this juncture:

2/22/52—Defendants wrote plaintiff that the centrifuge would have to be returned and asked permission to do so.

3/5/52—Plaintiff replied that a 25% "cancellation charge" would be exacted.

3/14/52—Defendants next communicated to the effect that the matter would be taken under advisement pending further correspondence.

3/20/52—The centrifuge was sent by defendants to plaintiff with freight charges prepaid.

4/14/52—Defendants stated that "we definitely will not accept this service charge as your equipment failed to perform as your laboratory guaranteed."

4/17/52—Plaintiff acknowledged receipt of the centrifuge.

Plaintiff has alleged and the lower Court found an original offer on the part of defendants to return the unit as of February 22, 1952. They then find an ac-

ceptance of the offer by plaintiff as of March 5, 1952, with the resultant contract.

TR p. 13—Findings of Fact—III:

> ". . . That thereafter the said defendants did offer to return to the plaintiff herein one of said machines, and the said plaintiff did agree to accept the return of said machine upon payment by the said defendants herein of the sum of $3,386.25. . . ."

TR p. 14—Findings of Fact—V:

> ". . . That it is true that the said machine was accepted and received solely and only upon the condition, agreement, and understanding of the defendants herein that the defendants would pay to the said plaintiff herein the sum of $3,386.25 aforementioned and no other. That the said defendants did so return said machine, and the said plaintiff did so accept said machine solely and only upon the aforesaid agreement, contract, and understanding that the said defendants would pay the said sum to the said plaintiff herein."

TR p. 17—Conclusions of Law—II:

> "That the said defendants herein did agree to pay to and became indebted to the said plaintiff herein for the sum of $3,386.25 as of the 22nd day of February, 1952."

If there had been an original offer by defendants on February 22, it was clearly rejected by the counter-offer by plaintiff. When the offeree purports an acceptance of an offer but modifies the terms of the original offer in any way or adds terms thereto, there

is in reality and law a counter-offer expressed by the offeree and the original offer is rejected.

Calif. Civil Code, Section 1585;

Bartone v. Taylor-Benson-Jones Co., 119 C.A. 2d 79, 258 P.2d 1054 (1953).

Therefore, clearly no contract could have been evolved out of the negotiations up to this point as one of the four requirements to an enforceable contract of law is mutual assent.

Calif. Civil Code, Section 1550.

It is not possible to find nor did plaintiff allege or the lower Court find, the formation of any contract to pay the "cancellation charge" from subsequent activities of the parties. Defendants' letter of March 14, 1952, was clearly not an acceptance of plaintiff's counter-offer. It stated:

TR pp. 40-41:

> ". . . In response to your letter of March 5th, we wish to advise that we will keep a direct answer in abeyance pending an exchange of correspondence between our respective offices.
>
> "You can expect to hear from us within a short time. . . .
>
> "In any event, we will write you in detail as soon as possible. . . ."

Plaintiff therefore, as offeror, was clearly notified that his offer had not been accepted and would only be, if at all, after the conclusion of further correspondence between the parties.

Without any further correspondence, defendants returned the machine to plaintiff who accepted said

unit and acknowledged receipt of same on April 17, 1952. Prior to such receipt, defendants wrote plaintiff on April 14, 1952:

TR pp. 42-43:

> ". . . It is indicated in one of your recent letters that if we were to return this equipment we would have to pay a 25% service charge. We wish to advise you that we definitely will not accept this service charge, as your equipment failed to perform as your laboratory guaranteed. . . ."

Therefore, plaintiff, upon receipt of the unit, had either received defendants' letter of the 14th of April, 1952, which clearly rejected the purported offer by plaintiff, or defendants' letter of the 14th of March, 1952, which made any acceptance contingent on further correspondence between the parties. In either event it cannot be claimed that a contract had come into existence. Plaintiff, upon receipt and retention of the unit in question, had notice of this fact.

Nor did the act by defendants in returning the unit constitute an acceptance of plaintiff's purported offer. Generally in the law of contracts there is a presumption that an offer invites a bilateral contract—a promise for a promise.

Davis v. Jacoby, 1 Cal.2d 370, 34 P.2d 1026 (1934);

Restatement, Contracts, Section 31, (1932).

It is quite clear from the record that plaintiff was inviting defendants to enter into a bilateral contract —requesting a promise from defendants to pay a

"cancellation charge" but nowhere in the record can an acceptance by defendants be found.

The general rule is well established that if the offeror calls for a promise, contemplating a bilateral contract, there must be an expression or communication of acceptance in order to constitute a contract.

Calif. Civil Code, Section 1565;

Restatement, Contracts, Section 52.

No exception to this rule is applicable here.

IV. EVEN IF THE TWENTY-FIVE PERCENT CANCELLATION CHARGE HAD BEEN INCORPORATED IN THE CONTRACT OF SALE, IT COULD NOT BE IMPOSED UPON DEFENDANTS AS IT IS A PENALTY UNDER THE GUISE OF LIQUIDATED DAMAGES.

The law as to a liquidated damage clause in a contract of sale is quite clear. To be legally effective, such a clause with its remunerative terms must have been fairly arrived at by the parties and damages for the breach of the contract must have been extremely difficult of ascertainment by independent judicial study.

Calif. Civil Code, Section 1670.

"Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

Calif. Civil Code, Section 1671.

"The parties to a contract may agree therein upon an amount which shall be presumed to be

> the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."
>
> *Electrical Products Corp. v. Williams,* 117 C.A.2d Supp. 813, 256 P.2d 403 (1953), and cases cited therein.

If such a "cancellation charge" had been predetermined by the parties and incorporated within the contract of sale, there is no doubt but what the lower Court would have demanded a showing by plaintiff that damages were incapable of being otherwise accurately ascertained. If defendants had agreed to such a "cancellation charge" in the contract of sale, they would have been given an opportunity to show that the so-called "cancellation charge" was merely a penalty and thereby plaintiff would have had to allege and prove any damage.

What if the "cancellation charge" unilaterally imposed by plaintiff had been 50% or 75% of the purchase price? Are all buyers who find it necessary to return goods to be subjected to such a charge? The general common law rule is codified in California Civil Code, Section 3359, as follows:

> "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

CONCLUSION.

It is respectfully submitted that:

1. If appellees are to recover at all they must rely upon an action for damages for the breach of the contract to purchase the machine. In such an event they must plead and prove actual damage, the measure of damage being the difference between the contract price and the reasonable value of the machine at the time of the breach.

2. There was no separate independent contract of February 22, 1952, upon which appellees could ground an action.

3. The judgment represents a penalty under the guise of "liquidated damages" contrary to law and reason.

4. The judgment should be reversed.

Dated, Jackson, California,
February 4, 1955.

Respectfully submitted,
DEASY AND DEASY,
By PIERCE DEASY,
Attorneys for Appellants.

No. 14,324

IN THE

United States Court of Appeals

For the Ninth Circuit

DeAngelis Coal Company, a Co-Partnership; American Lignite Products Co., a Co-Partnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, Individually and as Co-Partners, doing business under the name of American Lignite Products Co.,

Appellants,

vs.

The Sharples Corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

Honorable Dal M. Lemmon, Judge.

BRIEF OF APPELLEE.

Walter K. Olds,
Edward J. Boessenecker,
57 Post Street, San Francisco 4, California,
Attorneys for Appellee.

Pernau-Walsh Printing Co., San Francisco

Subject Index

Table of Authorities Cited

Cases

Codes

Texts

No. 14,324

IN THE

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For the Ninth Circuit

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Appellants,

vs.

The Sharples Corporation,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division.

Honorable Dal M. Lemmon, Judge.

BRIEF OF APPELLEE.

STATEMENT AS TO JURISDICTION.

Appellants' statement as to jurisdiction set forth at pages 1 and 2 of its brief herein is true and correct,

and appellee does hereby adopt and approve said statement.

ARGUMENT.

I. THE TRIAL COURT CORRECTLY FOUND THAT THE CENTRIFUGE IN QUESTION WAS RETURNED BY APPELLANTS TO APPELLEE UPON THE EXPRESS CONDITION AND AGREEMENT OF THE APPELLANTS TO PAY TO THE APPELLEE THE SUM OF $3,386.25.

The complaint alleges (TR 5), and the District Court found (TR 13-14), that the appellants purchased from appellee two machines known as Sharples Super-D-Canter Centrifuges, for the agreed price of $13,545.00 each; that thereafter appellants offered to return one of these machines to the appellee and the appellee agreed to accept the return of this machine upon the payment by the appellants to the appellee of the sum of $3,386.25; that the appellants returned the machine to appellee and agreed to pay the sum of $3,386.25 to the appellee.

The appellants do not challenge the finding of the Court to the original contract of sale from the appellee to the appellants. That transaction was completed, and on February 22, 1952, the date that the appellants offered to return the machine to the appellee (TR 36), title to the machine was in the appellants. Parenthetically, it may be noted, that the defense of warranty raised by the appellants in their complaint, was found against them by the District Court (Findings VI, VII and VIII; TR 15-16), and has not been made an issue on this appeal by the appellants.

The appellants' position, however, appears to be that they did not obligate themselves on a second contract for the return of the machine to the appellee when in April of 1952 they chose to return the machine to the appellee. A brief consideration of the facts as shown by the correspondence set forth in the record should suffice to dispose of this contention.

As we have seen, the appellants in their letter dated February 22, 1952, and addressed to the president of appellee (plaintiff's Ex. No. 6; TR 36-38) asked permission to return this machine to the appellee.

The appellee replied on March 5, 1952 (Plaintiff's Ex. No. 7, TR 38-39), stating:

> "We will accept the return of the last Super-D-Canter which we shipped to you, if this machine has not been used, and at a cancellation charge of 25% of the price of the machine.
> * * * * * * *
> Upon receipt of your firm order, we proceeded to manufacture this unit, and we experienced irrecoverable costs. It is our expectation that you will reimburse us for these costs, and this is the basis of the cancellation charge of 25%. . . ." (TR 38-39).

To this point the appellants are correct in their assumption that no contract had arisen. The appellee's reply of March 5, 1952 constituted an offer setting forth the terms and conditions under which the appellee would accept the return of the machine. On March 14, 1952, the appellants responded:

> "In response to your letter of March 5th, we wish to advise that we will keep a direct answer in abeyance pending an exchange of correspondence between our respective offices.
>
> You can expect to hear from us within a short time. . . ." (Plaintiff's Exhibit No. 8, TR 40).

The further correspondence to which appellants refer was not forthcoming, and on April 7, 1952, appellee wrote the appellants requesting payment of the original purchase price for the machine (Plaintiff's Ex. No. 9, TR 41).

On April 14, 1952, the appellants replied to this last letter in the following manner:

> "Your letter of April 7 addressed to our Carbondale address has been sent directly to us for our attention.
>
> By now you have probably received the return of the PY-14 Super-D-Canter. Perhaps this will answer your question as to why you have not received our check to offset the charges which you questioned in your letter. . . ." (Plaintiff's Ex. No. 10, Tr. 42).

As shown by Defendants Exhibit D (TR 46-47) the machine in question arrived at the appellee's plant in Philadelphia on April 16, 1952.

In the face of these undisputed facts, the appellant's contention that the District Court's finding of a contract for the return of the machine is not supported by the evidence, is untenable. It is, of course, true that where an offer or counter-offer is made, con-

templating a bilateral contract, there must be an expression or communication of acceptance in order to constitute a contract, but it is not true that the acceptance of an offer or counter-offer must in all cases consist of a verbal declaration by the offeree. On the contrary, the acceptance may be manifested by the performance by the offeree of the exact thing called for by the offer or counter-offer (Calif. Civil Code Sec. 1584; 135 A.L.R. 826).

> "An acceptance without objection or condition constitutes a binding contract when communicated to the offeror, and is usually made by express declaration or by unequivocal acts, as by signing the contract. Under certain circumstances, however, acceptance can be inferred from conduct on the offeree's part. Similarly, where an acceptance is qualified or varies the terms of an offer, constituting in effect a counter-offer, the terms of such counter-offer may be accepted by the original offeror by acts from which acceptance may be implied.
>
> * * * * * * *
>
> Conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the offeree, for it is a settled principle that the undisclosed intentions of the parties to a contract, in the absence of fraud, mistake, and the like, are immaterial, and the outward manifestation or expression of assent is controlling."
>
> 12 *Cal. Jur.* 2d 212-213.

See also:

Wood v. Gunther, 89 C.A. (2d) 718, 729.

It therefore follows that when the appellants undertook to ship the centrifuge, which they had previously purchased from appellee, to the appellee at its Philadelphia plant, that unqualified act constituted an acceptance in the view of the law of the terms and conditions set forth in the appellee's letter of March 5, 1952 (Plaintiff's Ex. No. 7).

Since title to the machine was in the appellants and since they admittedly knew of the terms upon which appellee conditioned its offer to take back the machine, they bound themselves to those terms and conditions when they undertook to return it.

II. DAMAGES WERE PROPERLY ASSESSED BY THE DISTRICT COURT BASED UPON THE CONTRACT FOR THE RETURN OF THE CENTRIFUGE.

In sections I and II of their brief appellants dispute the measure of damages applied by the District Court. In so doing, they misconstrue the nature of the cause of action alleged in the complaint and upon which the District Court based its judgment.

As we have seen, the evidence establishes and the trial Court found that when the appellants took it upon themselves to return the centrifuge in question to the appellee they thereby accepted the terms and conditions of the appellee's counter-offer and, by their act, agreed to pay the cancellation charge of 25 per cent of the purchase price. This contract furnishes

the measure of damages. *Union Liquors v. Finkel & Lasarow,* 44 C.A. (2d) 706, 710.

It must be borne in mind that, at the time the machine was returned, in law and in fact, title to the machine was, as found by the District Court, in the appellants. The initial contract of sale was at that time completed. The machine had been delivered to the appellants and the appellants were indebted to appellee on the contract of sale for the purchase price of the machine.

While the appellants speak of an "attempted rescission", no rescission has been shown, and they point to no part of the record which would sustain a rescission.

In appellants' opening brief (p. 6) the statement appears:

> "The Sharples Super-D-Canter is a standard article catalogued for sale by the plaintiff (TR p. 123, line 8)"

The reference is to a section of the reporter's transcript which was not designated as part of the printed record on appeal and hence, not proper for consideration on appeal. *Moses v. Hazen,* 69 F. 2d 842, 98 A.L.R. 386; *Rosborough v. Chelan County,* (C.C.A. 9) 53 F. 2d 198, 200. However, suffice it to say, that the record properly before this Court clearly shows that the machine in question was especially manufactured to the order and specifications of the appellants, and was not a stock item. We refer the Court to the following from Plaintiff's Exhibit No. 4, a letter

from appellee's president to appellants, dated November 21, 1951:

> "We require a minimum of seven months to build Super-D-Canters with hard surfaced conveyors . . ." (TR 31)

and from Plaintiff's Exhibit No. 11, a letter from appellee to appellants dated April 23, 1952:

> "Once again I want to point out that we proceeded to manufacture this unit upon the basis of an order received from you, and we experienced costs which are irrecoverable. There is no indication, nor have you given us any definite data which would support your statement that this equipment failed to perform satisfactorily. In the first place, our laboratory guaranteed nothing except to duplicate the performance obtained here in the laboratory when operating on the same material. Since this machine is a duplicate of the laboratory machine, there is just no doubt in my mind that it will produce the same performance." (TR 43-44).

III. NO QUESTION OF A PENALTY IS INVOLVED IN THIS APPEAL, EITHER IN FACT OR IN LAW.

In section IV of their opening brief (pp. 12 et seq.), appellants seek to argue that the cancellation charge was "a penalty under the guise of liquidated damages."

We might dispense with this contention by the observation that it is not included in appellants'

statement of points on which they intend to reply upon appeal.

But in any event the appellants once more misconstrue the basis of their liability. As alleged in appellee's complaint and as found by the District Court, appellants agreed to pay the cancellation charge when, by their unqualified act in returning the centrifuge to appellee, they accepted the appellee's offer to take back the machine upon the payment by appellants of the cancellation charge.

Without the necessity of referring the Court to any portions of the record not designated on this appeal, the exhibits designated as part of this record clearly and sufficiently show that the cancellation charge was based upon the irrecoverable costs incurred by appellee in the manufacture of this item to the order and specifications of the appellants.

Wherefore, it is respectfully submitted that the judgment herein should be affirmed.

Dated, San Francisco, California,
April 8, 1955.

WALTER K. OLDS,
EDWARD J. BOESSENECKER,
Attorneys for Appellee.

No. 14,324

United States Court of Appeals

For the Ninth Circuit

DeAngelis Coal Company, a Co-Partnership; American Lignite Products Co., a Co-Partnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, Individually and as Co-Partners, doing business under the name of American Lignite Products Co.,

Appellants,

vs.

The Sharples Corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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Pernau-Walsh Printing Co., San Francisco

Subject Index

Table of Authorities Cited

No. 14,324

United States Court of Appeals

For the Ninth Circuit

DeAngelis Coal Company, a Co-Partnership; American Lignite Products Co., a Co-Partnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, Individually and as Co-Partners, doing business under the name of American Lignite Products Co.,

Appellants,

vs.

The Sharples Corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Albert Lee Stephens, Walter L. Pope and James Alger Fee, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Appellee in the above entitled cause, presents this, its petition for a rehearing of the above-entitled cause, and in support thereof, respectfully shows:

I.

APPELLANTS, BY THEIR UNQUALIFIED ACT OF SHIPPING THE PY-14 SUPER-D-CANTER BACK TO APPELLEE ON MARCH 20, 1952, ACCEPTED APPELLEE'S OFFER OF MARCH 5, 1952, AND NOTHING SAID OR DONE BY APPELLANTS SUBSEQUENT THERETO CAN ALTER THEIR CONTRACTUAL OBLIGATION TO THE APPELLEE.

In this matter the appellants purchased two machines known as Sharples PY-14 Super-D-Canters from appellee. Becoming dissatisfied they wrote appellee on February 22, 1952, requesting permission to return the second machine. (T.R. 36.) On March 5, 1952, appellee replied that it would accept the return of this machine at a cancellation charge of twenty-five per cent, which represented appellee's costs of manufacture. (T.R. 38.) Appellants then wrote, on March 14, 1952, that they would hold an answer in abeyance pending an exchange of correspondence. (T.R. 40.) On March 20, 1952, appellants shipped the machine from their plant at Ione, California, to appellee's factory in Philadelphia. (T.R. 10.) No communication of any sort accompanied the machine or the bill of lading, nor did appellants seek to qualify or explain their action until April 14, 1952, when, in response to a letter of appellee, dated nine days before receipt of the machine in Philadelphia, demanding payment of the purchase price, appellant, *for the first time,* indicated that it would not pay the service charge. (T.R. 42.)

The trial Court gave judgment for the service charge. This Honorable Court reversed on the grounds that no contract existed for the payment of the service

charge. The record before this Court consisted solely of the pleadings and the correspondence, the reporter's transcript not having been requested.

It is respectfully submitted that the decision of the trial Court, Hon. Dal M. Lemmon, was correct, and that a binding contract for the payment of the cancellation charge came into force upon the shipment of the machine, *unqualified in any manner,* the only error in the findings being the minor one of finding the date of the contract as of February 22, 1952 rather than March 20, 1952, the correct date upon which the machine was shipped. (Finding III, T.R. 13.)

The sole question here involved is whether Sharples' offer to take back the machine for a twenty-five per cent cancellation charge was accepted by DeAngelis. That acceptance did not have to be by words or correspondence; it could, on elementary principles, be by the acts or conduct of the acceptor. *Zurich, etc., Assurance Co. v. Industrial Accident Commission,* 132 Cal. App. 101; *Wood v. Gunther,* 89 Cal. App. 2d 718; 17 Corpus Juris Secundum 374; 135 A.L.R. 826; 12 Cal. Jur. 2d 212.

This case illustrates and is governed by those principles. The machine in question, as admitted by DeAngelis (Defendant's Answer, T.R. 7), had been sold to and was the property of DeAngelis. DeAngelis had made certain complaints, which the trial Court found baseless. (Findings VI, VII and VIII, T.R. 15-16.) Since the opinion of the Court refers in several places to DeAngelis' dissatisfaction with the ma-

chines, it should not be out of order to note that the employee of DeAngelis charged with the operation of the machines in his testimony completely negated any failure of performance by the machines.

At this stage, and in response to DeAngelis' request to return the machine, Sharples made its offer. DeAngelis replied, neither accepting nor rejecting. Then, six days after this letter, DeAngelis shipped its machine to Sharples without explanation.

If DeAngelis wished to preserve any claimed rights against Sharples it was a simple matter for them to qualify their act of shipment. A letter could have been sent contemporaneously, or with the Bill of Lading, or enclosed with or attached to the packing case. None of these steps did they take. In the face of their failure so to qualify their act of shipment, it is clearly and unequivocally referable to Sharples' offer of March 5, 1952, and respondent was fully justified in relying upon it as an acceptance.

Cate v. Good Bros., (Cir. 3), 181 Fed. 2d 146, is a case squarely in point. That case arose out of the sale of cheese. The sale was completed and there was apparently a dispute over the merchantable quality of the cheese. The seller wrote the buyer that it would accept the return of the cheese, give him credit for the net proceeds of any resale and require payment of the balance forthwith. The trial Court found, as did Judge Lemmon in the instant case, that the shipment of the merchandise by the buyer back to the seller was an acceptance of the terms of the seller's

offer, and gave judgment on the resulting contract. The Court of Appeals, in affirming this judgment stated:

> "The record establishes no tender by the seller to take back the cheese except upon the terms of this letter. *Thus the buyer's conduct appears to be an unambiguous response to the seller's letter.* The finding that the letter of January 11, was an offer and the return of the cheese an acceptance of that offer is a reasonable construction of this language and behavior. We find no basis for disturbing it." 181 Fed. 2d at 148. (Emphasis supplied).

The majority opinion in the present case seems to hold that Sharples' letter of April 7, 1952 (T.R. 41), demanding the full purchase price, was a withdrawal of the Sharples offer of March 5. The machine, however, had been shipped on March 20, and, unknown to Sharples, was en route to Philadelphia on April 7. Not only was this not inconsistent with the preceding offer, as pointed out by the concurring opinion, but at that stage the offer was beyond revocation —it had been accepted by the shipment on March 20. If, thereafter, DeAngelis had tendered the cancellation charge, Sharples would have been bound and would have had no right to demand the original purchase price.

> "Where the offer is to do something if the offeree will not merely promise to do, but do, something, compliance with the conditions of the offer by doing the act in the way prescribed is ordinarily sufficient evidence of the acceptor's assent, and

> it is not necessary to show that he notified the offerer that he accepted the offer and would perform the condition." 17 Corp. Jur. Sec. 386. See also 12 Cal. Jur. 2d 215; *Davis v. Jacoby,* 1 Cal. 2d 370; *Los Angeles Traction Co. v. Wilshire,* 135 Cal. 654.

The opinion of the majority, it is respectfully submitted, seems to confuse the outward manifestation of assent, *which is all that is necessary for an acceptance,* with the actual or inward intentions of DeAngelis. The governing rule was most aptly stated by Justice Holmes in *Hobbs v. Massasoit Whip Co.,* 158 Mass. 194, 33 N.E. 495 (cited with approval in *Wood v.* Gunther, 89 C.A. 2d 718) in the following words:

> "The proposition that an offer may be accepted by the conduct of the offeree stands on the general principle that conduct which imports acceptance or assent *is* acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party—a principle sometimes lost sight of in the cases."

See also, *Brant v. California Dairies, Inc.,* 4 Cal. 2d 128.

It therefore follows that the absence of any language by DeAngelis to the effect that they would pay the purchase price can have no effect upon the formation of the contract, for their assent is founded on their actions, not their words. While they had complained of the results of their process, as to which this machine was but one part, prior to March 20, DeAngelis gave no indication that they would not pay

the cancellation charge until April 14, some three and one-half weeks after their act of shipping the machine back. It is respectfully submitted that this subsequent attempt to repudiate and negate the effect of the act of shipment is wholly without force to cancel out their previous manifestation of assent, whatever light it might cast on the inward or secret intentions of DeAngelis. To hold otherwise is to reject the objective standards by which the law judges the formation of contracts. *Williston on Contracts,* Section 66.

Nor is the case of *Wright v. Sonoma County,* 156 Cal. 475, relied on by the concurring opinion controlling. The *Wright* case simply holds that one cannot by a demand for payment convert a continuous tort into a contractual obligation so as to avoid the necessity of proving damages for the tort.

It is respectfully submitted that this case is governed by the principles applied in *Cate v. Good Bros.,* above cited and discussed, and on those principles the judgment should be affirmed.

II.

THE QUESTION OF WARRANTY OR GUARANTEE WAS DECIDED AGAINST APPELLANTS BY THE DISTRICT COURT ON THE OVERWHELMING WEIGHT OF THE EVIDENCE, IS NOT AN ISSUE BEFORE THIS COURT, AND CANNOT ALTER THE FIXED CONTRACTUAL OBLIGATIONS OF THE PARTIES.

The opinion of the Court refers throughout to a claim of guaranty by DeAngelis. The statement is made:

> "If it [DeAngelis] was right about that, it had a right to return the machine. The mere offer to let it be returned upon payment of a service charge would not cancel that right."

It might suffice to point out that the issue of guaranty or warranty was wholly and fully found against DeAngelis by the trial Court (Findings VI, VII & VIII, T.R. 15-16), was not, and, in the absence of the Reporter's Transcript, could not be made an issue on this appeal. It would therefore follow that DeAngelis had no right to return the machine, as, indeed, the District Court impliedly found. Their only basis for returning the machine was pursuant to Sharples' offer.

But the issue stands on even firmer ground. When DeAngelis originally sought to return the machine, Sharples would have been wholly within its rights to stand on the contract of sale, demand payment in full, and, if DeAngelis then returned the machine, either to ship it back or hold it to the order of DeAngelis. There was no breach of warranty and no breach of any guaranty.

Sharples instead made an offer, which, as shown by *Cate v. Good Bros.,* supra, was one for compromise and settlement of the dispute, which, though baseless, could be vexatious. When DeAngelis thereafter shipped back the machine it indicated its agreement to compromise the matter on the terms of Sharples' offer. Not until some three and one half weeks after it shipped the machine back, and almost one and one

half months after Sharples' offer of compromise, did DeAngelis for the first time claim or assert any right to return the machine for any other reason or on any other ground than in accordance with Sharples' offer. At that stage their obligation to pay the cancellation charge had, as shown above, become binding.

III.

THIS COURT BASES ITS DECISION ON A MISCONCEPTION OF THE EVIDENCE—DeANGELIS DID NOT PRESS ITS CLAIM OF GUARANTEE "ALL ALONG".

Prior to the shipment of the machine on March 20, DeAngelis had given no indication that it relied on any right to return the machine for a claimed breach of guarantee.

On the contrary, DeAngelis' letter of February 22 recognized that there was no such right to return the machine, and no such right was asserted. DeAngelis requested "written permission" to return the machine, which is clearly inconsistent with a right so to return it.

The statement in the opinion that "all along, without any exception, DeAngelis had pressed its claim that the purchase was upon a guarantee and that performance had failed", is based on a misconception of the evidence.

In the correspondence there appear references to a PY-14 Super-D-Canter and to "super centrifuges". The machine involved in this litigation is the PY-14

Super-D-Canter. The "super centrifuge" referred to was an entirely distinct machine, performing an entirely distinct operation in the process set up by DeAngelis, not purchased from Sharples, and in no way the subject of this litigation or the responsibility of Sharples. Both machines were centrifugal machines, manufactured by Sharples, but the Super Centrifuge was a used machine bought by DeAngelis on the second-hand market. Each had its own function in the overall process alluded to in the correspondence.

The importance of bearing this in mind is readily apparent. The letter of January 16, 1952 (Plf's. Exh. 5, T.R. 34), the first indication of DeAngelis' dissatisfaction, states that "* * * it appears that centrifugation does not afford a better process when compared with filtration" (T.R. 35), and "we are convinced that the *super-centrifuges* will not give us the desired product." (T.R. 35). There is no claim that the PY-14 Super-D-Canter was not performing according to any guarantee, real or imagined.

DeAngelis' letter of February 22 (T.R. 36), asking permission to return the PY-14 Super-D-Canter, again refers to DeAngelis' dissatisfaction with the process of centrifugation without any charge that the Super-D-Canter had failed in respect to any guarantee.

DeAngelis' letter of March 14 (T.R. 40), the last letter before the Super-D-Canter was shipped, states only that "the performance of the PY-14 Super-D-

Canter was directly contingent on the performance of the Super Centrifuge * * *".

Finally, in DeAngelis letter of April 14, 1952 (T.R. 42), in which for the first time DeAngelis advises that it will not pay the service charge, not the slightest reference to any claim of guarantee or breach thereof appears.

The importance of this, in the light of the Court's opinion, cannot be over-emphasized.

At no time during the course of correspondence did DeAngelis put Sharples on notice that it claimed a breach of guarantee as to the PY-14 Super-D-Canter, which is the only machine with which we are concerned.

It therefore follows that DeAngelis' unqualified act of shipping the machine to Sharples can have reference only to Sharples' offer of March 5, and was an unambiguous and unequivocal act of acceptance of that offer, in line with the authorities cited in Section I, above.

IV.

IN THE ABSENCE OF THE REPORTER'S TRANSCRIPT FROM THE RECORD ON APPEAL THE FINDINGS OF THE TRIAL COURT AS TO ALL DISPUTED QUESTIONS OF FACT ARE PRESUMED CORRECT AND SUPPORTED BY COMPETENT EVIDENCE.

The appeal herein is supported by a record consisting almost entirely of the pertinent pleadings and other papers in the clerk's file and the correspondence between the parties, introduced as exhibits. The

appellant did not choose to designate the Reporter's Transcript of testimony taken during the two days of trial as part of the record on appeal. Inasmuch as the burden of affirmatively showing error is on the party complaining thereof (5 C.J.S. 562), and a presumption exists that, where the determination of a question presented for review depends on evidence and the record on appeal does not show or purport to show all the evidence pertaining to it, the evidence was sufficient to sustain the ruling of the trial Court (5 C.J.S. 273), the appellee chose to augment the record only by adding a small portion of the Reporter's Transcript showing Judge Lemmon's allowance of an amendment to the complaint, and by requesting that all of the exhibits be included.

We raise this point because it would appear that certain assumptions have been taken from the record which, as pointed out above, are not only not supported by but are negated by the evidence upon which Judge Lemmon based his judgment.

The rule which governs is aptly stated by Corpus Juris Secundum as follows:

> "Where none of the evidence is brought up on appeal and properly presented to the Appellate Court, the findings will be presumed to be sustained by the evidence, and a similar rule applies where but part of the evidence is brought up. If the evidence is not in the record it must be assumed that the facts as found were true, and that issues of fact were determined in favor of the prevailing party."
>
> 5 C.J.S. 412.

We raise this point, not because of any doubt that this Court has both the power and the right to determine whether the facts as found by Judge Lemmon and supported by the evidence sustain the legal conclusion that a contract was entered into for the payment of the cancellation charge, but because the language of the Court seems to indicate an acceptance by this Court as facts, of certain propositions—to-wit, that DeAngelis was pressing a claim of guaranty as to the PY-14 Super-D-Canter at the time it was shipped to Sharples (which is discussed in Part III above), the issue as to guarantee, and, in the concurring opinion, the question as to proof of an acceptance of Sharples' offer.

As to these matters, and any other question of fact, it is submitted that Judge Lemmon's findings are beyond attack by appellants in this Court in the absence of a complete record.

For the reasons stated above, petitioner requests that a rehearing be granted and that on such rehearing the judgment of this Court be reversed and the judgment of the United States District Court be affirmed.

Dated, San Francisco, California,
April 2, 1956.

Respectfully submitted,
WALTER K. OLDS,
EDWARD J. BOESSENECKER,
Attorneys for Appellee and Petitioner.

Certificate of Counsel

The Sharples Corporation, appellee herein, by its attorney, hereby certifies that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded in law and proper to be filed herein.

Dated, San Francisco, California,
April 2, 1956.

Respectfully submitted,
Walter K. Olds,
Edward J. Boessenecker,
Attorneys for Appellee and Petitioner.

No. 14,324

United States Court of Appeals

For the Ninth Circuit

DeAngelis Coal Company, a Co-Partnership; American Lignite Products Co., a Co-Partnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, Individually and as Co-Partners, doing business under the name of American Lignite Products Co.,

Appellants,

vs.

The Sharples Corporation,

Appellee.

APPELLANTS' ANSWER TO APPELLEE'S PETITION FOR A REHEARING.

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Subject Index

Table of Authorities Cited

Cases

Texts

No. 14,324

United States Court of Appeals
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DeAngelis Coal Company, a Co-Partnership; American Lignite Products Co., a Co-Partnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, Individually and as Co-Partners, doing business under the name of American Lignite Products Co.,

Appellants,

vs.

The Sharples Corporation,

Appellee.

APPELLANTS' ANSWER TO APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Albert Lee Stephens, Walter L. Pope and James Alger Fee, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Appellants herewith answer Appellee's Petition for a Rehearing. Each of the points upon which Appellee predicates his petition for a rehearing are answered

herewith in the same order in which those points appear in Appellee's petition on file herein. Appellee will be hereinafter referred to as "Sharples", Appellants will be hereinafter referred to as "DeAngelis".

I.

APPELLANTS DID NOT CONTRACT WITH APPELLEE AS OF THE TWENTY-SECOND DAY OF FEBRUARY, 1952, OR AT ANY OTHER DATE, TO INCUR A TWENTY-FIVE (25%) PER CENT "CANCELLATION CHARGE" INCIDENT TO THE RETURN OF THE UNIT IN QUESTION.

There is no support in this record that as a matter of law, the parties entered into a binding contract for the payment by DeAngelis to Sharples of a 25% cancellation charge. The comment upon the evidence consisting of a review of relative correspondence between the parties and of the law applying thereto was fully included within Appellants' (DeAngelis) opening brief. Sharples reasserts in its petition for a rehearing that the acceptance by DeAngelis of a 25% cancellation charge was manifested by the return of the machine. However, as was clearly pointed out in the Opinion of this Court reversing the lower court, the shipment of the machine by DeAngelis under the circumstances here present was not an unequivocal act. An acceptance must be unequivocal; it must be positive and unambiguous. Cf. *Williston on Contracts,* paragraph 72; *Restatement of Contracts,* paragraph 58. The act of DeAngelis in returning the unit did not constitute an acceptance of Sharples' purported offer. As has been pointed out

in Appellants' (DeAngelis) opening brief, in the law of contracts "There is a presumption that an offer invites a bilateral contract—a promise for a promise". *Davis v. Jacoby,* 1 Cal. 2d 370, 34 Pac. 2d 1026 (1934); *Restatement, Contracts,* Section 31 (1932). Professor Williston in his treatise on contracts, Volume 1, Section 60, also takes the position that a presumption in favor of bilateral contracts exists. In the comment following Section 31 of the Restatement the reason for such presumption is stated as follows:

> "It is not always easy to determine whether an offeror requests an act or a promise to do an act. As a bilateral contract immediately and fully protects both parties, the interpretation is favored that a bilateral contract is proposed."

Additionally, it is not true as is contended by Sharples that a binding contract for the payment of the cancellation charge came into force upon the shipment of the machine, unqualified in any manner. The evidence is overwhelming that DeAngelis resisted payment of any service charge under all circumstances. Without exception DeAngelis had pressed its claim that the purchase was upon a guaranty and that performance had failed. It is also additionally abundantly clear that the shipment of the machine by DeAngelis was an equivocal act in that it could be construed to have been an act performed pursuant to its own insistence that there had been a breach of warranty and that it had an absolute right to return the machine.

Appellee (Sharples) now, in its petition for a rehearing, raises the point that "If DeAngelis wished to preserve any claimed rights against Sharples it was a simple matter for them to qualify their act of shipment of the machine when it did so." Its postcard acknowledgment of acceptance of the machine (Defendants' Exhibit D, Tr. 46) is certainly unqualified, and indicates upon its face by the "X" mark prefacing the statement that "a credit will be issued to your account". They could have accepted the machine for the account of DeAngelis; they could have refused acceptance of the machine, but they did neither of these things—they unqualifiedly accepted the machine for credit.

The case of *Cate v. Good Bros.* (Cir., 3) 181 Fed. 2d 146, is not in point with relation to the facts of this case. There, as here, the door is wide open for the seller to give the buyer credit for the net proceeds of any resale and require payment of the balance. That is the point that Appellants (DeAngelis) have been steadfastly arguing for, that is that the complaint, if advised, should have been couched in terms of a complaint for damages, if any, for a breach of the original contract of purchase and sale.

There was no separate or distinct contract between the parties and therefore there is no necessity for a rehearing as such. The opinion, together with the concurring opinion, should stand as rendered.

II.

Appellee's (Sharples) discussion of the question of warranty or guaranty is not before this Court and was not before the Court upon appeal. The fact that DeAngelis did not prevail in its claim of breach of warranty in the lower Court does not affect in any particular the lack of separate contract to pay a cancellation charge. The evidence before this Court included within the transcript of record abundantly supports the statements in the opinion and concurring opinion filed herein that DeAngelis continuously and repeatedly and vehemently pressed its claim that the machine didn't do the work it was supposed to have done, that it was unsatisfactory and that they were going to return it. The record further shows that DeAngelis did put into temporary use and pay for fully one of the machines at a total cost of $13,500.00. It is quite true as Appellee in its petition for rehearing points out, that Sharples would have been wholly within its right to stand on the original contract of sale. Actually and resulting from the effect of the opinion rendered herein, it still has a right to stand on its contract of sale by the allowance of the right upon the part of Sharples to amend its complaint and to prove and recover if it may damages for the breach of the contract for sale.

III.

Under the heading number III of Appellee's petition for rehearing, Sharples takes exception to the

statements in the opinion and concurring opinion that DeAngelis had evidenced great dissatisfaction with the machine. There seems to be a confusing dissertation upon the identity of a "Super-D-Canter" and "super centrifuges". Certainly a reading of the transcript of the record will make apparent an abundance of support for the factual basis for the wording appearing in the opinion and concurring opinion of this Court. Whether the dissatisfaction in all instances was with the "super centrifuge" or Super-D-Canter, yet a determination of this question certainly would have no bearing whatsoever upon the question whether there was an effective enforceable separate contract for the payment of the 25% cancellation charge.

Appellee (Sharples) in the course of this dissertation upon the distinction between Super-D-Canter and the "super centrifuges" makes this statement: "At no time during the course of correspondence did DeAngelis put Sharples on notice that it claimed a breach of guarantee as to the PY-14 Super-D-Canter, which is the only machine with which we are concerned." (Appellee's Petition for a Rehearing, page 11.)

Starting with Plaintiff's Exhibit No. 5 and including Plaintiff's Exhibit No. 6, Plaintiff's Exhibit No. 8 and Plaintiff's Exhibit No. 10 (Tr. 34-42), that record is entirely contrary to Appellee's statement above quoted.

A review of these exhibits again points up the fact that the shipping of the machine by DeAngelis did

not constitute an acceptance of an offer of Sharples to accept the return of the machine by payment of a 25% cancellation charge but was motivated by the claim by DeAngelis that performance had failed, and that it could be construed to have been an act performed pursuant to its own insistence that there had been a breach of warranty.

The question before this Court upon this point is not whether the lower court had found against DeAngelis on its claim of breach of warranty but on the contrary the position of DeAngelis with reference to the inadequacy of this machine in the early part of 1952.

IV.

Under this paragraph Appellee (Sharples) complains that Appellants (DeAngelis) did not choose to designate the reporter's transcript of testimony taken during two days of trial as part of the record on appeal. Strangely, Appellee did not raise this question upon its initial consideration before this Court and the complaint now is that there might have been other or different evidence upon which the lower court based its judgment. Suffice it to say that no assumptions of fact were made in the opinion and concurring opinion of this Court which were not supported by the evidence included within the transcript of record in this case. Appellants (DeAngelis) believed and still believe that the record before this Court is amply sufficient to show the error of the

court below and that, had Appellees believed otherwise or had they believed that the record was not sufficiently complete, or sufficiently inclusive to have focused attention upon evidence favorable to them and contrary to or in confliction with the transcript of record before this Court, it had the power to, and would have requested an augmentation of the record upon consideration of the appeal herein.

For the reasons argued in Appellants' (DeAngelis) opening brief and supported by the opinion and concurring opinion of this Court upon this matter, Appellants respectfully submit that this Court should not grant to appellees a rehearing in this case.

Dated, Jackson, California,
April 11, 1956.

Respectfully submitted,
DEASY AND DEASY,
PIERCE DEASY,
JAMES E. DEASY,
Attorneys for Appellants.

No. 14328

United States Court of Appeals

for the Ninth Circuit

BETTY GULLEY,

Appellant,

vs.

MARY JANE GULLEY, Also Known as Mary J. Gulley, Now MARY JANE WAUSON, and UNITED STATES OF AMERICA,

Appellees.

Transcript of Record

Appeal from the United States District Court for the District of Nevada

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-2-54

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

NAMES AND ADDRESSES OF ATTORNEYS

ROBERT R. GILL,
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Reno, Nevada,

For Appellee U. S. A.

OLIVER C. CUSTER,
Attorney at Law,
220 S. Virginia Street,
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RIDLEY C. SMITH,
Attorney at Law,
114½ West Fourth Street,
Santa Ana, California,

For Appellee Mary Jane Gulley.

In the District Court of the United States, for the District of Nevada

Civil No. 867

BETTY GULLEY,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA and MARY JANE GULLEY, Also Known as MARY J. GULLEY,

Defendants.

COMPLAINT

1. Plaintiff is a resident of Ely, within the District of Nevada. She is a married woman, the wife of Guy A. Gulley, of the same place, and brings this action in her own name as for the recovery of separate property. This action is brought under the World War Veterans' Act, as amended (45 Stat. 964), and the National Service Life Insurance Act, as amended (54 Stat. 1014); 38 U. S. C. A. §445 and following.

2. Plaintiff is the mother, and the said Guy A. Gulley the father, of Wallace Phillip Gulley, who was born November 13, 1925; enlisted in the United States Marine Corps on May 28, 1943; was honorably discharged therefrom at Tienstin, China, on March 20, 1946, but re-enlisted therein at the same place on March 21, 1946; and died on August 13, 1947, from injuries sustained in a motorcycle-automobile collision while still in the service and sta-

tioned at the United States Marine Corps Air Station at El Toro near Santa Ana, California.

3. While in training at San Diego, California, on July 1, 1943, the said Wallace Philip Gulley applied for and had issued to him by the defendant United States a certificate of National Service Life Insurance in the sum of $10,000, payable in case of death, and named plaintiff as beneficiary thereunder.

4. That monthly premiums of $6.40 each were deducted from the service pay of the said Wallace Phillip Gulley and paid to the Veterans Administration and the said National Service Life Insurance certificate remained in full force and effect at the time of his death as aforesaid, which occurred within the five year term of said insurance certificate and without any conversion thereof to other type of insurance, and without any change of beneficiary having been made by written request therefor as provided by the regulations of said Veterans Administration.

5. On December 6, 1947, plaintiff duly made claim in writing to the Veterans Administration of the United States for the payment of the sum due beneficiary under such certificate of insurance, but was thereafter informed by said Veterans Administration that "the widow" (meaning the defendant Mary Jane Gulley) had made claim for this insurance and submitted evidence for the purpose of showing that a change of beneficiary was made in

her favor. Thereafter such proceedings were had thereon that on December 28, 1948, plaintiff was advised that the conflicting claims had been determined in her favor; on March 10, 1949, of advice from the said widow of her intention to appeal from the action of disallowance of her claim; and on May 23, 1949, that the said Mary J. Gulley had so appealed. On August 19, 1949, plaintiff was advised that the said appeal had been certified to the Board of Veterans Appeals, and on April 12, 1950, there were forwarded to her a letter advising that a decision constituting administrative denial of her claim had been reached by the Board of Veterans Appeals, together with a copy of such decision. The letter also advised her that unless notice were received within sixty days from its date of her intention to institute further legal action, settlement of other claims for such insurance, if any, would be affected. Such notice was so given in writing under date of April 22, 1950, and this action is being brought pursuant thereto.

6. That as appears from the matters set forth under paragraph 5 hereinabove, a disagreement exists between plaintiff and the said Veterans Administration as to payment of such insurance according to the terms of the certificate.

7. That as plaintiff is informed and believes and on such information and belief alleges, the defendant Mary Jane Gulley now resides and at all times herein mentioned has resided outside of the District and State of Nevada, and that her present place of

residence is at Downey in the County of Los Angeles and State of California.

8. That the said defendant Mary Jane Gulley is a necessary party defendant hereto, and should be brought in by appropriate order in order that the right to the proceeds of such insurance may be judicially determined between plaintiff and said defendant.

Wherefore, plaintiff prays judgment:

(a) That the defendant Mary Jane Gulley take nothing by her said claim;

(b) That the defendant United States of America be required to pay to plaintiff the full amount of such insurance;

(c) For a reasonable fee to be paid to her attorney for the prosecution of this action; and

(d) For her costs of action herein incurred.

/s/ ROBERT R. GILL,
Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed May 26, 1950.

[Title of District Court and Cause.]

ANSWER

Comes Now, the defendant Mary Jane Gulley and answers the complaint of plaintiff on file herein as follows:

I.

Defendant admits paragraph 1, of plaintiff's complaint.

2.

Defendant admits paragraph 2, of plaintiff's complaint.

3.

Defendant admits paragraph 3, of plaintiff's complaint.

4.

Defendant admits the allegations contained in paragraph 4, of said complaint commencing with the words, "that monthly premiums" on line 4, page 2, and ending with the words, "other type of insurance" on line 10, page 2. Defendant denies the allegations in paragraph 4, page 2, commencing with the words, "and without any" on line 10, and ending with the words, "Veteran's Administration" on line 12.

5.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5, of said complaint and therefore denies the same.

6.

Defendant admits paragraph 6, of said complaint.

7.

Defendant admits paragraph 7 of said complaint.

8.

Defendant admits paragraph 8, of said complaint.

For a Further, Separate and Affirmative Defense, Mary Jane Gulley, Defendant, Alleges:

1.

That defendant and Wallace Phillip Gulley were lawfully married on October 15, 1946, at Los Angeles County, California.

2.

That about two months after the marriage of defendant and the said Wallace Phillip Gulley the said Wallace Phillip Gulley advised the defendant, his wife, that he had made a change of beneficiary in his National Service Life Insurance policy so that the said defendant was named as beneficiary rather than his mother Betty Gulley, the plaintiff herein.

3.

Defendant alleges upon information and belief that the said Wallace Phillip Gulley delivered or caused to be delivered to the proper officials a written form to change the beneficiary of his National Service Life Insurance policy from that of his mother Betty Gulley, to his wife Mary Jane Gulley, this defendant; and that said form was delivered on or prior to February 5, 1947.

4.

That during his period of service while he was

stationed at the United States Marine Corps Air Station at El Toro, California, the said Wallace Phillip Gulley, husband of Mary Jane Gulley, dedefendant herein, filled out and signed a confidential statement in which, among other things, he stated that he held a National Service Life Insurance policy in the amount of $10,000, and he listed Mrs. Wallace Phillip Gulley, his wife, the defendant herein, as the beneficiary thereof.

5.

That on April 12, 1950, the Board of Veteran's Appeals, Veteran's Administration, Washington, D. C., made its decision and final determination, wherein it held that the defendant herein, Mary Jane Gulley, was the beneficiary in the National Service Life Insurance policy of the said Wallace Phillip Gulley.

6.

That the defendant Mary Jane Gulley has employed Ridley C. Smith, Attorney at Law of Santa Ana, California, and Oliver C. Custer, Attorney at Law of Reno, Nevada, to represent her in this case. That she has not paid her said attorneys any fees whatsoever and has not entered into any contract for a fee with said attorneys and that said attorneys have not charged a fee or received a fee as compensation for their services. That defendant requests this Court to allow a reasonable fee to her said attorneys pursuant to the statute in such cases made and provided.

Wherefore, the defendant Mary Jane Gulley re-

spectfully prays that the plaintiff take nothing by her complaint on file herein and that the same be dismissed; that the Court adjudge and decree that the defendant Mary Jane Gulley is the beneficiary in said policy of National Service Life Insurance on the life of Wallace Phillip Gulley and that the Court decree that she is entitled to all of the proceeds from said policy of life insurance; that the defendant be awarded her costs and disbursements including a reasonable fee for her said attorneys; and for such other and further relief as to the Court may seem equitable in the premises.

/s/ OLIVER C. CUSTER,

/s/ RIDLEY C. SMITH,

Attorneys for Defendant,
Mary Jane Gulley.

[Endorsed]: Filed October 17, 1950.

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL CONFERENCE

Pursuant to the Order heretofore made, the Pre-Trial Conference in the above-entitled action was held at Reno, Nevada, at 10:30 a.m. of Friday, June 22, 1951, Robert R. Gill, Esq. appearing for plaintiff; Bruce R. Thompson, Esq., Assistant United States Attorney, appearing for defendant United States of America; and Oliver C. Custer, Esq. appearing for defendant Mary Jane Gulley,

It Is Hereby Ordered that the action taken at such Pre-Trial Conference is as follows:

The defendant Mary Jane Gulley has produced for the inspection of plaintiff the original of the document called "Confidential Statement" referred to in Paragraph VII of the Second Defense contained in the answer of the United States. Counsel for the plaintiff has returned, after inspection, the document called "Confidential Statement" mentioned in said Paragraph VII of the Second Defense in the answer of the United States.

The Confidential Statement is offered in evidence by the defendant Mary Jane Gulley and admitted as defendant Mary Jane Gulley's Ex. A.

Plaintiff does not concede the statement in the answer of the United States indicating that this document was ever in the possession of the Marine Corps unless there is some other evidence on that or that it was ever filed officially with anyone. Plaintiff admits its execution and existence.

As to Paragraphs VI and VII of the answer of the United States, the plaintiff denies that the document "Confidential Statement" was at any time filed with the Commanding Officer at El Toro Marine Air Base, California.

Matters Remaining In Controversy:

1. Whether the document "Confidential Statement" was filed with the proper officer of the United States Marine Corps. Plaintiff contends that to be

effective such document should have been filed with the Commanding Officer at the El Toro Marine Air Base.

2. Even if so filed, such document would not have constituted a change in beneficiary.

Dated: This 10th day of September, 1951.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed September 10, 1951.

[Title of District Court and Cause.]

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Betty Gulley, the mother of Wallace Phillip Gulley, brought this action against the United States of America and Mary Jane Gulley to determine whether she or Mary Jane Gulley, now Mary Jane Wauson, is entitled as beneficiary to the proceeds of a National Service Life Insurance policy issued July 1, 1943, on the application of Wallace Phillip Gulley.

In Bradley v. United States, 10 Cir., 143 F. 2d 573, a National Service Life Insurance policy was issued to Eugene Morris Bradley while serving as a flying officer in the United States Army, in which his mother was designated as beneficiary. Subsequently he married and his wife testified at the

trial that the insured had discussed with her the matter of changing the beneficiary in his policy from his mother to her and had expressed an intention to do so. She also testified that he later informed her that "he had taken care of the insurance at the army base." Affidavits of a number of his comrades stated he had on numerous occasions discussed with them the proposition of changing the beneficiary of his insurance from his mother to his wife and that he had sought and obtained advice from them concerning the method for effecting the change and expressed an intention so to do. After the death of the insured, the Veterans' Administration requested and received the "confidential personal report" executed by the insured and filed with the Headquarters of the 57th Pursuit Group, Windsor Locks, Connecticut. The Veterans' Administration informed the mother of its receipt of the report, and that according to it, her son had stated that his wife was the beneficiary under the government insurance. The Court in its opinion stated (p. 577):

"[6] In every case involving war risk insurance wherein the courts have recognized and decreed a change of beneficiary, the facts have amply shown not only an expressed intention, but positive and unequivocal acts on the part of the insured, designed to effectuate his expressed intentions. Citing cases. And in the absence of some act or deed having for its purpose the execution of the insured's intention, the courts have refused to decree a change of beneficiary. Citing cases.

"[7] To meet this postulate, it is argued that the 'confidential personal report' executed by the insured, addressed to and filed with his group headquarters, constituted not only an expression of his intention, but an attempt to change the beneficiary from his mother to his wife, which the court should recognize as the fulfillment of his intentions and the requirements of the regulations. * * *

"[8] * * * When given its most liberal construction in the light of all the facts and circumstances, we are convinced that it [confidential personal report] cannot be treated as an effectuation of the insured's intention to change his beneficiary."

Circuit Judge Murrah delivered the opinion of the Court, Circuit Judge Bratton concurred, and Circuit Judge Phillips dissented. There is a difference of opinion on the questions here presented among the circuits—some follow the prevailing opinion and others the dissenting opinion. Judge Phillips, considering the confidential report said:

"In the report, referred to in the majority opinion, the insured stated that he had the policy of insurance and that the beneficiary thereunder was Ann M. Bradley, his wife, and that the policy was in her possession. That he believed that by making such statement in the report and delivering the policy to his wife he had effected the change of beneficiary is manifest by the fact that immediately thereafter he told his wife he had 'taken care of the insurance at the Army Base.' "

In the present case, the confidential report does not show who had custody of the policy.

In Shapiro v. United States, 2 Cir., 166 F. 2d 240:

"* * * the insured reported to Lt. Dunn, a battalion adjutant at Fort McClellan, Alabama, and said he had recently been married and wished to change the beneficiary of his insurance policy from his mother to his wife. A day or two later, he stated to Dunn that he wished to fill out the form so changing his beneficiary. Lt. Dunn told a clerk to give Shapiro the form for changing his life insurance beneficiary. The clerk gave him a W. D., A. G. O. Form No. 41 which, though entitled 'Designation of Beneficiary,' was not designed to be used to change the beneficiary of an insurance policy but was a form intended for designating the beneficiary of the six months' gratuity, payable in case of death, and the person to be notified in case of emergency. * * * Shapiro filled out and signed this form, naming his wife as primary beneficiary, and his mother as alternate beneficiary, in the event the wife died before payment was made. Lt. Dunn then witnessed this form, which was forwarded by the message center to the War Department in Washington. * * *

"[4] We have in the case at bar both an act of the insured in signing the form, and oral evidence of his intent to effect thereby a change of beneficiary of his insurance policy. Under the authorities,

a change of beneficiary was thus legally effected. Citing cases."

In referring to Bradley v. United States, 10 Cir., 143 F. 2d 573, and Judge Phillips' dissenting opinion therein, and Collins v. United States, 10 Cir., 161 F. 2d 64, the Court, near the close of its opinion, stated:

"We cannot say that either decision differed as a matter of law from the other authorities we have cited, or from the conclusion we have reached in the case at bar. If the Bradley decision be thought to differ, the conclusion reached in the dissenting opinion of Judge Phillips accords with our own views."

In Kendig v. Kendig, 9 Cir., 170 F. 2d 750, Circuit Judge Healy, speaking for the Court of a confidential statement such as we have here, said:

"[2] Kendig's confidential statement filed with his Aviation squadron is the most important item of proof here. The mother claims it is purely hearsay, or, if competent for any purpose, that it can be considered only as evidence of an unexecuted intent. We disagree. The statement is not hearsay nor is its probative value limited to its bearing on the insured's intent, if indeed it bears more than retrospectively on that subject. It has dignity at least as evidence of a past act—much greater dignity, we think, than has an oral declaration made in the course of a conversation, however serious. Oral declarations of this type are likely to be misunder-

stood or misreported, or they may have been intended merely to reassure. This statement, on the contrary, imports verity. Its solemnity becomes evident when we remember that it was prepared and signed by one who realized that his life was hourly in jeopardy and who was aware of the inexorable circumstances under which, only, the document would be opened and read."

The Court, having heard the evidence adduced at the trial, makes the following findings of fact and conclusions of law:

Findings of Fact

1. That this action was brought under and by virtue of 38 U.S.C.A. § 445, and following.

2. That plaintiff is the mother of Wallace Phillip Gulley. That Wallace Phillip Gulley enlisted in the United States Marine Corps on May 28, 1943, and was honorably discharged therefrom at Tientsin, China, on March 20, 1946, and re-enlisted in said Marine Corps on March 21, 1946; that he died on August 13, 1947, from injuries sustained in a motorcycle-automobile collision while still in the Service and stationed at the United States Marine Corps Air Station at El Toro near Santa Ana, California.

3. That on July 1, 1943, a certificate of National Service Life Insurance in the amount of $10,000, payable in case of death, was issued to said Wallace Phillip Gulley and that his mother, the plaintiff Betty Gulley, was named as beneficiary therein.

4. That monthly premiums of $6.40 each were deducted from the service pay of Wallace Phillip Gulley and paid to the Veterans' Administration and that said National Service Life Insurance certificate remained in full force and effect at the time of his death; that no written request for change of beneficiary was made on the form designated by applicable regulations of the Veterans' Administration.

5. That on December 6, 1947, plaintiff made claim in writing to the Veterans' Administration of the United States for the sum due beneficiary under said certificate of insurance; that the widow, Mary Jane Gulley, also made claim to such insurance to the Veterans' Administration and submitted evidence for the purpose of showing that a change in beneficiary was made in her favor. That on December 28, 1948, plaintiff was advised that the conflicting claims had been determined in her favor; that on March 10, 1949, plaintiff received notice from said widow of her intention to appeal; and that on August 19, 1949, plaintiff was advised that said appeal had been certified to the Board of Veterans' Appeals.

That on April 12, 1950, plaintiff received notice that a decision constituting an administrative denial of her claim had been reached by the Board of Veterans' Appeals and that unless notice was received within sixty (60) days of plaintiff's intention to institute further legal action, settlement of other claims for such insurance, if any, would be effected.

That notice of plaintiff's intention to institute legal action was given in writing under date of April 22, 1950, and that this action was brought pursuant thereto.

6. That Wallace Phillip Gulley and Mary Jane Gulley were married at Downey, California, on October 15, 1946, and that they continued to be husband and wife until the death of said Wallace Phillip Gulley on August 13, 1947. That after the death of Wallace Phillip Gulley, his then widow, Mary Jane Gulley, remarried on December 29, 1950, to a man named Wauson.

7. That on January 29, 1947 the then Mary Jane Gulley caused a policy of life insurance to be issued by Occidental Life Insurance Company in the sum of $2,000 naming her husband Wallace Phillip Gulley as beneficiary thereof. That said policy was in lieu of a former policy of the same company naming Mary Jane Gulley's mother as beneficiary.

That at or about the time of such change of beneficiary in favor of decedent, he stated to his wife that he was also going to change his said National Service Life Insurance certificate over to her as beneficiary.

Several months after the conversation of about January 29, 1947, defendant Mary Jane Gulley informed decedent that she contemplated taking out another insurance policy and in response to such suggestion, the following conversation in substance

occurred between decedent and said Mary Jane Gulley:

He responded by informing her that they were paying enough premium for insurance and Mary Jane Gulley then made the following statement, for the moment not thinking of the National Service Life Insurance certificate: "Well, you don't have any insurance." And decedent replied, "I do. I have $10,000 in government insurance in your name." And he stated that he was then paying $6.40 a month premium for the National Service Life Insurance policy.

8. That during the month of June, 1947, at El Toro, California, Neil D. Baker, then a member of the Marine Corps, inquired of decedent whether he had had his insurance changed and decedent replied that he had had his insurance changed to his wife's name, and decedent informed said Baker that his wife Mary Jane Gulley was the beneficiary of his National Service Life Insurance, and decedent informed said Baker that the amount of said insurance was $10,000. That said conversation was in the back room of the Staff NCO Club, Marine Corps Air Station, El Toro, California.

9. That on February 5, 1947, said decedent Wallace Phillip Gulley executed and filed in the office of Headquarters Squadron, U. S. Marine Corps Air Station, El Toro (Santa Ana), California, a document called "Confidential Statement" which, among other matters, contained the following:

"11. I hold the following insurance policies:

(1) (Company): NSI. (Amount): 10,000. (Beneficiary): Mrs. Wallace P. Gulley."

That the Mrs. Wallace P. Gulley named therein as beneficiary is the said Mary Jane Gulley.

10. That a few days after Mother's Day in May, 1947, decedent Wallace Phillip Gulley stated in substance to his brother Guy William Gulley as follows: "* * * in the event that the folks were separating, that he was leaving his insurance in his mother's name, due to the fact that she had a home, which she did, and no other source of income."

11. That said decedent did state on or about Mother's Day in May, 1947, to his sister Virginia Barbee in substance as follows: "My brother told me he was having trouble with his wife and he did not change his insurance; he had left it the way he had previously made it to my mother, without any contingent."

12. That on the occasion of the visit of the decedent Wallace Phillip Gulley, on or about Mother's Day, 1947, or at any other time or at all, there was no conversation by the mother, or in her presence by any other person, concerning who then was, or who was to be, designated as beneficiary of the aforesaid National Service Life Insurance.

13. That Oliver C. Custer, Attorney at Law of Reno, Nevada, and Ridley C. Smith, Attorney at Law of Santa Ana, California, prepared and caused

to be filed in this action the answer of Mary Jane Gulley to plaintiff's complaint; that said attorneys performed services in the gathering of the evidence submitted to the Court herein on behalf of said Mary Jane Gulley and in support of her claim; that they represented her and acted as her attorneys and counselors in all proceedings before this Court in this action, including the trial of the case.

Conclusions of Law

From the foregoing facts the Court concludes:

1. That on or about January 29, 1947, Wallace Phillip Gulley first manifested his intention to change beneficiaries under the National Service Life Insurance certificate issued to him July 1, 1943, that is, to make Mary Jane Gulley, his wife, beneficiary instead of Betty Gulley, his mother, who was originally designated as beneficiary in said certificate.

2. That on February 5, 1947, said Wallace Phillip Gulley took affirmative action evidencing an exercise of his right to change beneficiary by filing, on said date, with Headquarters Squadron, United States Marine Corps Air Station, El Toro (Santa Ana), California, his "Confidential Statement" containing among other matters the following:

"11. I hold the following insurance policies:

(1) (Company): NSI. (Amount): 10,000. (Beneficiary): Mrs. Wallace P. Gulley."

3. That the defendants, Mary Jane Gulley, now Mary Jane Wauson, and the United States of America, are entitled to judgment and that judgment herein should be entered as follows:

A. Adjudging and decreeing that plaintiff Betty Gulley take nothing by her complaint on file herein;

B. Adjudging and decreeing that said Mary Jane Gulley is the beneficiary in said policy of National Service Life Insurance of Wallace Phillip Gulley, deceased, and that she have all the proceeds from said policy of life insurance including attorney's fees as hereinafter indicated;

C. Adjudging and decreeing that each party pay its own costs herein incurred.

4. That defendant Mary Jane Gulley's attorneys are entitled to fees for their services in this action in an amount to equal ten (10) per centum of the amount recovered and to be paid by the Veterans' Administration out of the payments to be made under the judgment herein at a rate not exceeding one-tenth of each of such payments until paid.

Let Judgment Be Entered Accordingly.

Dated: This 16th day of December, 1953.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed December 16, 1953.

[Title of District Court and Cause.]

COPY OF CIVIL DOCKET ENTRY OF JUDGMENT

"Dec. 16, 1953: Filing Opinion, Findings of Fact and Conclusions of Law.

"Dec. 16, 1953: Entering Judgment in accordance with above Opinion. Judgment: Ordered that plaintiff Betty Gulley take nothing by her complaint; that Mary Jane Gulley is the beneficiary in said policy of National Service Life Insurance of Wallace Phillip Gulley, deceased, and that she have all the proceeds from said policy of life insurance including attorneys' fees as hereinafter indicated; that each party pay its own costs; that defendant Mary Jane Gulley's attorneys are entitled to fees for their services in this action in an amount to equal ten (10) per centum of the amount recovered and to be paid by the Veterans' Administration out of the payments to be made under the judgment herein at a rate not exceeding one-tenth of each of such payments until paid."

Attest: A true copy.

[Seal] AMOS P. DICKEY,
Clerk,

By /s/ C. S. DAVENPORT,
Deputy.

United States District Court for the
District of Nevada

Case No. 867

BETTY GULLEY,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA and MARY JANE GULLEY, also known as MARY J. GULLEY,

Defendants.

JUDGMENT

Pursuant to, and in accordance with the opinion, findings of fact and conclusions of law which were filed and entered of record in the above-styled cause, on December 16, 1953, finding the issue against the plaintiff and in favor of the defendant, Mary Jane Gulley (now Mary Jane Wauson, by remarriage), it is this 29th day of January, 1954,

Ordered, Adjudged and Decreed:

1. That the plaintiff, Betty Gulley, do have and recover nothing of and from the defendant, the United States of America, under the $10,000 policy of National Service Life Insurance involved in this litigation, identified as Policy No. N-12 173 160.

2. That the defendant, Mary Jane Wauson, as the last designated beneficiary of the said policy of insurance, do have and recover of and from the defendant, the United States of America, the death benefits thereof, the same to be paid to her by the Veterans' Administration in accordance with the

terms of the National Service Life Insurance Act of 1940, as amended, and the applicable administrative regulations.

3. That there be deducted by the defendant, the United States of America, an amount equal to ten per centum (10%) of the total amount remaining to be paid under the policy, the said ten per centum (10%) to be deducted from any and all payments on the policy, whether monthly or otherwise, as attorneys' fees for the attorneys representing Mary Jane Wausnn in this action, namely, Oliver C. Custer, Esq., whose address is 220 S. Virginia Street, Reno, Nevada, and Ridley C. Smith, Esq., whose address is Santa Ana, California; said payment for attorneys' fees to be paid directly to said Oliver C. Custer, Esq. and by him to be apportioned between himself and Ridley C. Smith, Esq. as they have agreed or may agree.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed January 29, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Amos P. Dickey, Clerk of the above-entitled Court:

Notice Is Hereby Given that Betty Gulley, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 16th day of December, 1953.

Dated February 13, 1954.

/s/ ROBERT R. GILL,
Attorney for said Appellant.

[Endorsed]: Filed February 15, 1954.

[Title of District Court and Cause.]

SECURITY FOR COSTS ON APPEAL

To Amos P. Dickey, Clerk of the above-entitled Court:

There is deposited with you herewith in behalf of Betty Gulley, appellant, by Guy A. Gulley and Betty Gulley, husband and wife, Cashier's Check No. 51180 of The Ely National Bank, Ely, Nevada, in your favor for the sum of Two Hundred Fifty Dollars, dated February 1, 1954, she having filed herein a Notice of Appeal from the judgment of the Court made and entered on the 16th day of December, 1953, in the above-entitled action.

The condition of the deposit of said sum is that the said appellant will pay all costs assessed against her on the said appeal or on a dismissal thereof not exceeding Two Hundred Fifty Dollars, the sum on deposit herein.

Dated February 13, 1954.

/s/ ROBERT R. GILL,
Attorney for Plaintiff and Appellant.

[Endorsed]: Filed February 15, 1954.

In the United States District Court,
for the District of Nevada

No. 867

BETTY GULLEY,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA and MARY JANE GULLEY, Also Known as MARY J. GULLEY,

Defendants.

Before: Hon. Roger I. Foley,
Judge.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered, that the above-entitled matter came on regularly for trial before the Court sitting without a jury at Carson City, Nevada, on Monday, the 22nd day of June, 1953.

Appearances:

ROBERT R. GILL, ESQ.,
Attorney for Plaintiff.

JAMES W. JOHNSON, JR., ESQ.,
Attorney for Defendant United States of America.

OLIVER C. CUSTER, ESQ. and
RIDLEY C. SMITH, ESQ.,
Attorneys for Defendant Mary Jane Gulley.

GUY WILLIAM GULLEY

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Gill:

Q. Will you state your full name, Mr. Gulley?

A. Guy William Gulley.

Q. And what is your relationship to Eddy Gulley? A. Brother. He is the older son.

Q. Oldest of the family?

A. Oldest of three boys.

Q. And Wallace Phillip Gulley was your brother? A. Yes.

Q. You knew him, of course? A. Yes.

Q. Will you state, to the best of your recollection, the last time you saw Wallace alive?

A. The last time I saw Wallace alive, sir, was in El Toro, after being released from the service in 1947; I was home for a few days.

Q. Who was released from the service?

A. I was, and a few days later my brother arrived home on leave on Mother's Day and that was the first time I had seen him in several years. I last seen him in New River, North Carolina three years before.

Q. This occasion was in North Carolina where you saw him last? A. No, Santa Ana.

Q. Well, you may give it in proper sequence. I may be confused.

A. The last time I seen Wallace was in Santa Ana.

(Testimony of Guy William Gulley.)

Q. And that was in 1947 you said?

A. Yes, sir. [2*]

Q. And you refer to Mother's Day?

A. Yes.

Q. The month of May, 1947?

A. Yes, sir.

Q. State whether or not, on that occasion, you had any conversation with your brother relative to his insurance. Answer yes or no on that.

A. Well, I don't quite understand, sir.

Q. Will you state whether or not, on the occasion when you saw your brother at Santa Ana, California, or about that time, there was any conversation between you about his insurance?

A. Yes, sir.

Q. What was the substance of that conversation? How did it come up?

A. Well, sir, on my brother's arrival home, he talked me into returning to Santa Ana for a small vacation, which I figured I rated at that time. Therefore my brother and I—I preceded him by twenty-four hours to Santa Ana. I left on Sunday night, which I believe was the day after Mother's Day, and proceeded to Las Vegas, at which time I joined my brother. I met him there and we proceeded to Santa Ana by bus. We had various types of conversation on the bus and mostly about the marital relations with my present wife, from whom I was anticipating a separation.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Guy William Gulley.)

The Court: Your present wife? [3]

A. Yes, sir.

Q. And did the topic of insurance come up?

A. It eventually did.

Q. In your connection?

A. Yes, sir. I was contemplating a separation from my wife and my brother asked me what I was going to do about Helen and I told him that due to her conduct, I was going to leave her as little as possible, at which time the insurance came into the picture and I held this policy of insurance——

Q. What was your military service?

A. Approximately nine years.

Q. In what branch?

A. United States Marine.

Q. The same your brother served in?

A. Yes, sir.

Q. Proceed.

A. Well, the conversation came up, as I said, about my relations between my wife and I and I said I would leave just what little I could and he asked me about my boy, who was at that time a year or so old. Anyway, the insurance came up and he asked me about the ten thousand dollar policy and I told him I was going to have it transferred back to my mother's name, which it was originally in.

Q. Then you had ten thousand insurance originally to your mother, which you had changed to your wife? A. Yes, sir. [4]

Q. And you contemplated another change?

A. Contemplated a change.

(Testimony of Guy William Gulley.)

Q. And what further?

A. Well, due to the fact that my mother and father were having difficulties at that time, my father's name came into the picture. My father and my brother didn't get along very well and upon the expiration of his first enlistment they had various words, which resulted more or less in my brother's re-enlisting in the United States Marine Corps and due to his attitude and love for his mother, he stated that in the event—a separation of course came into the matter, and I guess my folks were more or less anticipating that—in the event that the folks were separating, that he was leaving his insurance in his mother's name, due to the fact that she had a home, which she did, and no other source of income.

Q. That was in or about the month of May, 1947? A. Yes, sir, approximately May.

Q. You spoke about having changed your own insurance while you were in the Marines.

A. Well, sir, I was discharged, on terminal leave at that time.

Q. But when you made the change from your mother to your wife, was that when you were in the service? A. Yes, sir, that was 1944.

Q. You are then, I presume, more or less familiar with the process of changing? [5]

A. Yes, sir.

Q. And will you state briefly what that process was?

(Testimony of Guy William Gulley.)

A. Well, sir, at that time I was a sergeant and sergeants who are in charge of their platoons, most of them are recruits, they completed basic training, and a lot of those fellows didn't realize the benefits of insurance at that time, so, therefore, non-combats were encouraged to encourage them to take out this NSLI, which we did, of course.

Q. You were unmarried at that time, I presume, when you took it out in your mother's name?

A. Yes, sir.

Q. And subsequently what process did you go through to change to your wife?

A. The process I took, sir, in changing my beneficiary, my policy, I contacted my first sergeant and had official form filled out and I believe that form was made in six copies, five or six anyway. Change of beneficiary on this application was taken before the company first sergeant.

Mr. Custer: I respectfully object to this line of testimony, as being immaterial.

The Court: Well, the objection is a little late. I can't very well entertain an objection to any suggested line of testimony.

Mr. Custer: I object to any further testimony on this line. [6]

The Court: Then make your objections when the questions are propounded.

Mr. Gill: Your Honor, now or later, by this witness or another, I intend to have a form of request for change of beneficiary identified, but I haven't it at hand right now.

(Testimony of Guy William Gulley.)

Q. What, on that occasion, did your brother say —you have said, I think, he had intended to leave his insurance in his mother's name?

A. Yes, sir. My brother was very close to my mother——

Mr. Custer: I object——

The Court: That may go out. It is not responsive.

Mr. Gill: Cross-examine.

Mr. Custer: No cross-examination.

VIRGINIA BARBEE

a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Gill:

Q. Will you state your full name, please?

A. Virginia Pearl Barbee.

Q. Your maiden name was Gulley?

A. Yes.

Q. And Betty Gulley is what?

A. My mother.

Q. And Bill, who just testified, is your brother?

A. My brother.

Q. Are you older or younger than the late Wallace Phillip [7] Gulley?

A. I am the oldest child of the family.

Q. And when was the last time you saw Wallace Phillip Gulley alive?

A. The last time I saw my brother was in May

(Testimony of Virginia Barbee.)

on Mother's Day—excuse me, the day previous to Mother's Day. He arrived on Saturday afternoon, 1947.

Q. That is about the second Sunday in May, is it not, Mother's Day? A. I believe it is.

Q. You don't know the exact date?

A. No, I don't.

Q. And how long did he remain with you in Ely?

A. My brother I saw there Saturday afternoon and I saw him for the last time the following afternoon, which was Mother's Day. It was late afternoon.

Q. Did he come to Ely alone at that time?

A. Yes, he did. His wife was not accompanying him.

Q. Were you a married woman at that time?

A. Yes.

Q. The same marriage you have now or another?

A. No, that was my previous marriage. This is my second. My previous marriage I had three children.

Mr. Custer: I object to that, your Honor, as being immaterial. [8]

The Court: I don't see where it is material.

Mr. Gill: It leads, your Honor, to this insurance matter.

The Court: Well, go ahead; we will see.

Q. What, if any, conversation did you have with Wallace Gulley on that occasion on the topic of insurance?

(Testimony of Virginia Barbee.)

A. Of course, Saturday afternoon was quite an exciting day because——

Mr. Custer: Your Honor, I object. The question is, what was the conversation.

The Court: Well, that will stand.

A. And I did not get to speak with my brother. I was very close to my brother, I believe that he and I were the closest of all the children, and therefore he came to see me at my home, which is separate from my mother's home, on Mother's Day in the late afternoon. We had started talking, of course, about the children, of whom he was very fond, and we were—I had stated I was very sorry I had not had the opportunity to meet Mary Jane. They had been to Ely previously, soon after they were married and I had been out of town, therefore, I had not had the pleasure of meeting her, and I asked my brother if she were ill, that she didn't accompany Wallace to Ely.

Mr. Custer: I object, your Honor, and move all that be stricken as not responsive to the question. The question was, what was the conversation. [9]

The Court: It may go out.

A. I am leading up to the conversation as I saw it.

The Court: Just a minute—it will be stricken. Read the question.

(Question read.)

A. At that time I was having trouble with my own marital affairs——

(Testimony of Virginia Barbee.)

Mr. Custer: That is still objected to.

The Court: Yes, just state what was the conversation by your brother.

A. That is what I am trying to say. I can't just jump in what it was. I am trying to give you a thorough picture, so you will understand. As I said, I was having trouble and had three children. My husband was a former GI——

The Court (Interceding): That isn't an answer to the question. All that is stricken. Listen to the question and answer it, please.

(Question read.)

Mr. Gill: If there is any explanation, maybe we will get it in later.

A. My brother told me he was having trouble with his wife and he did not change his insurance; he had left it the way he had previously made it to my mother, without any contingent.

Q. That was about the second week in May?

A. It was Mother's Day in May. [10]

Q. 1947? A. 1947.

Mr. Gill: You may cross-examine.

Mr. Custer: No questions.

BETTY GULLEY

the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Gill:

Q. Your name is Betty Gulley? A. Yes.

Q. And you are the mother of the late Wallace Phillip Gulley? A. Yes.

Q. And the mother of these two witnesses who have just testified? A. Yes.

Q. How many children have you had altogether, Mrs. Gulley? A. Eight, three sons.

Q. How many of them are living now?

A. All of them.

Q. Except—— A. Wallace.

Q. What is your husband's name?

A. Guy Gulley.

Q. And this is the only marriage you have ever had? A. Yes. [11]

Q. Mrs. Gulley, I show you a copy of a typewritten paper and I ask you if you have ever seen that before?

A. Yes, I have. It was mailed to me right after——

Mr. Gill: Your Honor, I have shown the witness an application for National Service Life Insurance. It will not be required further and I think might be admitted in evidence. Any objection?

Mr. Custer: No objection.

The Court: It may be admitted in evidence as plaintiff's Exhibit 1.

PLAINTIFF'S
EXHIBIT NO. 1

ETERANS ADMINISTRATION
Insurance Form 350

APPLICATION F[illegible] NATIONAL SERVICE LIFE I[illegible]SURANCE

UNDER SECTION 602 (a) NATIONAL SERVICE LIFE INSURANCE ACT OF 1940 AND REGULATIONS OF THE VETERANS ADMINISTRATION
WITHOUT REPORT OF PHYSICAL EXAMINATION

or use by persons who enter the active service in the land or naval forces of the United States after October 8, 1940. Application must be made to the Veterans Administration while in the active service and within 120 days after entrance into such service. NOTE.—Persons in the active service on October 8, 1940, and persons who thereafter reenlist or reenter the active service immediately following discharge from previous enlistments or who thereafter are discharged to immediately accept commissions and whose services are continuous, must make application on Insurance Form 350a, which requires a complete report of physical examination.) USE INK OR TYPE.

1. NAME IN FULL: (Please print or type)	First	Middle	Last name
	Wallace	Phillip	GULLEY

2. HOME ADDRESS: Number	Street or rural route	County, city, town, or post office	State
971	Lyons Ave.	Ely	Nev.

3. I WAS BORN AT	City, town, or post office	State	Day of month	Month	Year	Age nearest birthday
	Wells	Nev.	13th	November	1925	18

4. DATE OF ENTRY INTO PRESENT TOUR OF ACTIVE DUTY	5. PRESENT ORGANIZATION Rank, grade, or rating	Organization, regiment, station, ship, etc.	6. SERIAL NUMBER
23Jun43	Pvt.	USMCR, RD, MCR, San Diego, Calif.	504971

7. DATE OF SEPARATION FROM LAST TOUR OF ACTIVE DUTY. (If no previous active duty, state "none.")	8. ARE YOU NOW DISABLED ON ACCOUNT OF INJURY OR DISEASE? IF NO, STATE DETAILS
None	No

9. I HEREBY APPLY FOR INSURANCE ON THE FIVE-YEAR LEVEL PREMIUM TERM PLAN IN THE AMOUNT OF	10. I WILL PAY PREMIUMS AS INDICATED BELOW: BY DEDUCTION MONTHLY	BY ALLOTMENT MONTHLY	PAYMENTS TO BE MADE DIRECT TO VETERANS ADMINISTRATION AS FOLLOWS: Monthly	Quarterly	Semiannual	Annual
$ 10000	$	$ 6.40	$	$	$	$

11. ARE YOU NOW CARRYING GOVERNMENT LIFE INSURANCE? (ANSWER "YES" or "NO"). No. IF "YES" GIVE AMOUNT OF INSURANCE AND POLICY NUMBER IF AVAILABLE. AMOUNT, $ ..... POLICY NO. .....
(No person may carry a combined amount of National Service Life Insurance and U. S. Government Life Insurance in excess of $10,000 at any one time)

12.	FULL NAME OF BENEFICIARY (If married woman, her own first and middle name and husband's last name must be stated)	Relationship	Amount for each beneficiary	Post-office address (Number and street, city, town, or post office)
PRINCIPAL	Betty Gulley	Mother	$10000	971 Lyons Ave. Ely, Nev.
CONTINGENT				

Permitted class of beneficiaries: Husband or wife, child, parent, brother or sister of the insured. (See reverse side, Paragraph 4.)

13. I REQUEST THAT THE EFFECTIVE DATE of this policy be made the 1st day of JULY, 19 43. If no date is specified the insurance herein applied for shall become effective as follows:
a. If the first premium is to be paid by allotment or deduction, the insurance will become effective on the first day of the month following the month in which the application and allotment or authorization for deduction are executed, provided the amount of the premium is deducted from the applicant's active service pay in accordance with the allotment or authorization, or
b. If the first premium is paid by direct remittance, the insurance will become effective as of the day on which the application and tender of premiums are made and forwarded to the Veterans Administration.
(See reverse side, Paragraph 1, for further information as to effective dates of insurance)
THE UNITED STATES IS NOT LIABLE FOR DEATH OCCURRING PRIOR TO THE EFFECTIVE DATE OF THE POLICY

14. I REQUEST THE POLICY BE MAILED TO—
Beneficiary
(Name) (Please print or type) (Address)

15. (A) I WILL AUTHORIZE (Allotment) from my pay for month of JUNE 1943, to cover the monthly premium of $ 6.40 on the amount of insurance applied for. (This authorization may be effective during periods of active service only.)

(B) I enclose herewith remittance payable to the TREASURER OF THE UNITED STATES by {Draft / Money order / Check} in the amount of $ ..... to cover the first ..... premium of $ ..... as the amount of insurance applied for.
(Write above whether monthly, quarterly, semiannual, or annual)

SIGNED AT RD, MCR, San Diego, Calif. ON THE 1st DAY OF JULY, 19 43
WITNESSED BY: and
INFORMATION AS TO SERVICE CERTIFIED BY:
L. V. GRANVILLE
2nd Lt. USMCR, RD, MCR, San Diego, Calif.
(Rank and organization. See reverse side, Paragraph 6)

Wallace Phillip Gulley
(Applicant sign here. Do not print signature)

NOTE.—Penalties for fraud in securing for self or another the issue or payment of insurance: $1,000 to $5,000 fine and imprisonment. Insurance will be forfeited for crime, treason, spying or other specified offenses. (Sections 813, 815, and 612, National Service Life Insurance Act of 1940.)

DO NOT USE THIS SPACE

Effective date ..... Age ..... Amt., $ ..... Premium: Mo. $ ..... Qr. $ ..... S. A. $ ..... A. $ .....
Beneficiary .....
Action taken .....
Examiner ..... Reviewer .....
Certificate issued ..... Policy issued .....

Endorsed: Filed June 22, 1943.

16—18411-1

6

(Testimony of Betty Gulley.)

Q. Another paper, Mrs. Gulley, do you recognize that? A. I do.

Q. What is that?

A. That is his National Service Life Insurance.

Q. This is the original policy?

The Court: Is that the policy?

Mr. Gill: It is the policy itself.

The Court: It may be withdrawn at any time on substitution of photostatic or typewritten copy. Counsel can stipulate.

Mr. Custer: We so stipulate, your Honor.

The Court: Whichever is most convenient to produce, either typewritten or photostatic.

Mr. Custer: No objections.

Mr. Gill: With that understanding, your Honor, we offer [12] in evidence the policy as plaintiff's Exhibit 2.

The Court: It will be admitted in evidence, with permission to withdraw on substitution.

PLAINTIFF'S EXHIBIT No. 2

The United States of America
Veterans' Administration
Washington, D. C.

National Service Life Insurance

Date Insurance Effective: July 1, 1943.

Certificate No. N-12 173 160.

This Certifies That Wallace Phillip Gulley has

(Testimony of Betty Gulley.)

applied for insurance in the amount of $10,000, payable in case of death.

Subject to the payment of the premiums required, this insurance is granted under the authority of The National Service Life Insurance Act of 1940, and subject in all respects to the provisions of such Act, of any amendments thereto, and of all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under authority of the Act, shall constitute the contract.

[Seal] /s/ FRANK T. HINES,
Administrator of Veterans' Affairs.

Countersigned at Washington, D. C.

Date: August 16, 1943.

/s/ M. INGEBRETSON,
Registrar.

Mrs. Betty Gulley,
971 Lyons Ave.,
Ely, Nevada.

Insurance Form 360

[Endorsed]: Filed June 22, 1953.

(Testimony of Betty Gulley.)

Q. I show you another paper, Mrs. Gulley; did you ever see that before? A. Yes, I did.

Mr. Gill: Your Honor, the witness has identified a printed form for change of beneficiary. The ink and shorthand notations thereon are not part of the exhibit. I can explain those. Your Honor, the lady has identified a small picture of her son which she would rather not offer.

The Court: Let us take care of Exhibit 3 first. Any objection?

Mr. Custer: May I ask the purpose? It is just a blank form.

Mr. Gill: It is to identify a form which was used at that time.

The Court: Just illustrative of the form.

Mr. Custer: We have no objections.

The Court: And I understand the written material, pencil or pen, is not involved here.

Mr. Gill: I could have the witness explain what there is on there. I offer this in evidence, No. 3.

The Court: No. 3 is admitted, for the purpose of showing the form. [13]

44

9FAAB

VETERANS ADMINISTRATION
Insurance Form 724
Rev. April 1937

USE A SEPARATE FORM FOR EACH POLICY ON WHICH A CHANGE OF BENEFICIARY IS DESIRED

Policy No. K 1,015,956

CHANGE OF BENEFICIARY—UNITED STATES GOVERNMENT LIFE INSURANCE

I, the undersigned insured, hereby cancel all previous designations of beneficiaries under the above-numbered United States Government life insurance policy and direct that said insurance, which amounts to $....., be paid from and after my death as follows:

GIVE COMPLETE NAME AND ADDRESS OF EACH BENEFICIARY (NOTE.—If a married woman, her own first name, maiden surname, and husband's last name must be stated)	RELATIONSHIP	AMOUNT OF INSURANCE TO BE PAID TO EACH BENEFICIARY
NO. 867		
EXHIBIT NO. 3		

Signed at ..... on this, the ..... day of ....., 19

Signature of witness .....

Signature of insured .....
(Do not print)

Address ..... (Street and number)
..... (Post office and State)

Address ..... (Street and number)
..... (Post office and State)

This form, when completed, should be immediately forwarded WITH THE POLICY to the Veterans Administration for endorsement of change of beneficiary.

Signature of insured should be in ink and witnessed by a responsible and disinterested person. The rank and organization of the insured and the witness should be stated if the insured is in the military or naval service.

The insured, under a United States Government life insurance policy, may designate any person, firm, corporation, or legal entity as beneficiary under his policy, either individually or as trustee.

A change of beneficiary may be made by the insured at any time and without the knowledge or consent of the previous beneficiary, except that *no change of beneficiary* may be made by last will and testament. An original designation of beneficiary may be made by last will and testament.

If no beneficiary be designated by the insured for United States Government life insurance, either in his lifetime, or by his last will and testament, or if the designated beneficiary does not survive the insured, then there shall be paid to the estate of the insured the present value of the remaining unpaid monthly installments; or if the designated beneficiary survives the insured and dies before receiving all of the installments of insurance payable and applicable, then there shall be paid to the estate of such beneficiary the present value of the remaining unpaid monthly installments.

The insured cannot assign his United States Government life insurance. The insurance shall be exempt from all taxation, and from the claims of creditors of the insured or the beneficiary, except any claims of the United States arising under any of the laws relating to veterans.

8

U. S. GOVERNMENT PRINTING OFFICE 16—838

(Testimony of Betty Gulley.)

Mr. Gill: Yes, showing the form.

Q. Were you acquainted with your son's former wife, Mary Jane?

The Court: Have you offered a photograph?

Mr. Gill: The lady preferred not to put this in evidence.

Q. Were you acquainted with your son's former wife, Mary Jane Gulley?

A. I met her once before his death.

Q. Approximately when was that?

A. Well, I couldn't say, but it was some time early in the spring of '47. I couldn't give the exact date.

The Court: That is the only time you met her?

A. That is the only time.

The Court: And when was it?

A. In the spring of '47.

Q. And where was that?

A. At my husband's home.

Q. In Ely, Nevada? A. Yes.

Q. And what was the next occasion when you saw her?

A. When I was called to California when he was killed. The next time I saw my son was when I was called to California.

Q. You had received word of his injury and you went there? A. Yes, I was notified.

Q. And where did you see your daughter-in-law then?

A. Well, I saw her at the place where they were rooming, a [14] Mrs. Palmer's.

(Testimony of Betty Gulley.)

Q. In what town? A. In Santa Ana.

Q. Where did you go on that occasion? What was your point of arrival?

A. At the naval hospital in Long Beach. I was to meet Mary there.

Q. Was there some prearrangement to meet her?

A. Yes, the night she called me and told me of Wallace's critical injury.

Q. Was she there when you arrived?

A. She was not.

Q. Did you meet her later in Santa Ana?

A. Yes, we went down to Mrs. Palmer's.

Q. On the same day? A. On the same day.

Q. Did you find her there on your arrival?

A. No, she was up town with a girl friend.

Q. But you did eventually meet her?

A. Yes.

Q. Was that the occasion when Mary Jane returned to Nevada for the funeral? A. Yes.

Q. Do you recall any discussion with the hospital authorities, or someone, as to an escort for the [15] body?

A. Yes, they told my husband that he was allowed an escort.

Mr. Custer: Your Honor, I object, I don't see the materiality.

The Court: The proponent in this case is Neil Baker.

Mr. Custer: It refers to a deposition not offered in evidence, but we will offer it, but I don't see

(Testimony of Betty Gulley.)

what materiality this has to the point before the Court.

Mr. Gill: It is premature.

Q. Was anything said on that occasion about an escort for the body?

The Court: Objection sustained.

Mr. Gill: On that line of questioning?

The Court: On that question. I don't rule on lines of questioning.

Mr. Gill: I will ask the Court's pardon.

Q. Now you said that Mary Jane returned to Nevada for the funeral? A. Yes.

Q. How did she come up?

A. She came up with my husband and my son, William Gulley.

Q. And how did the body come up?

A. The body was shipped to Caliente with Neil Baker as escort.

Q. Had you ever met Neil Baker before?

A. No, I never met Neil Baker until Saturday afternoon when he arrived with the body. [16]

Q. Did you hear any conversation on that occasion between your husband and Neil Baker?

Mr. Custer: Objected to as calling for hearsay, not binding.

The Court: Just answer that yes or no.

Q. Did you hear a conversation between your husband and Neil Baker? A. Yes.

Q. Now, subject to objection, what did your husband ask Neil as to his relationship with his son?

Mr. Custer: Your Honor——

(Testimony of Betty Gulley.)

The Court: Objection sustained.

Mr. Gill: That goes out.

Q. Did you or your husband make any suggestion as to an escort for the body?

A. No, we did not. We were informed there would be one marine to escort him home.

Q. Do you know who named Neil Baker?

A. Mary Jane named Neil Baker.

Mr. Gill: Cross-examine.

Mr. Custer: No cross-examination.

Mr. Gill: That, your Honor, is plaintiff's case in chief.

Mr. Custer: Your Honor, please, at this time I ask the Court to give me the deposition of Neil Baker, which has been filed. Your Honor, at this time I would like to open the [17] deposition and offer it in evidence and read it to the Court. It was taken pursuant to stipulation.

Mr. Gill: No objection. My objections were reserved, except as to the form of the question.

The Court: The deposition may be opened. You want to read the deposition and make objections to the deposition as propounded to you?

Mr. Gill: Yes, sir.

The Court: Very well.

Mr. Custer: May it please the Court, the original stipulation for taking the position is in, together with the questions. I shall read your Honor the stipulation, omitting the title of the court and cause. (Reads "Stipulation for Taking Deposition.") The questions then, direct and cross, are as follows:

DEPOSITION OF NEIL D. BAKER

"No. 1. What is your name?

"A. Neil D. Baker.

"No. 2. Where do you reside?

"A. Marine Corps Air Station, El Toro, Santa Ana.

"Q. Were you acquainted with Wallace P. Gulley during his lifetime?

"A. Yes, I was.

"Q. When did you first become acquainted with him?

"A. Well, in September, 1946.

"No. 6. What was Wallace P. Gulley's occupation when [18] you first knew him?

"A. He was a Marine.

"No. 7. Did you ever have any conversation with Wallace P. Gulley concerning National Service Life Insurance?

"A. Yes, I did.

"No. 8. Please state when and where you had this conversation.

"A. It was in the back room of the Staff NCO at the Marine Base, which was our quarters back there and it was in June of '47. It was right after I came off of furlough, that's how I remember that, and the subject of insurance was brought up, I believe I brought it up, and I asked Wally if he had had his insurance changed and he said, 'Yes,' that he had had his insurance changed to his wife's name.

"No. 9. Who, if anyone else, was present?

"A. There was no one else present except Wally and I.

(Deposition of Neil D. Baker.)

"No. 10. What did you say to him?

"A. Well, I asked him about his insurance, we brought that up some way, I don't know just how it came up but I had asked him if he had his insurance changed over to his wife's name, as I said before.

"No. 11. What did he say to you?

"A. He said yes, he had had the insurance changed over to his wife's name.

"No. 12. Did Wallace P. Gulley ever make any statements [19] to you as to who was the beneficiary of his National Service Life Insurance?

"A. Yes, he did, he stated it was his wife.

"No. 13. When and where did he make the statement, if any, and who was present?

"A. It was at the Marine Corps Air Station in the back room of the Staff NCO Club that was out at the Base and we were in our quarters in a back room there where we were quartered.

"No. 14. What did he say?

"A. He said that he had made the insurance out to his wife, he had changed it over to his wife's name.

"No. 15. Did you ever fill out a Confidential Statement?"

Mr. Gill: Your Honor, we object to that question as immaterial. The witness is not a party to the suit, not involved in it in any way and I can't see any point in whether he had or he had not made a confidential statement.

(Deposition of Neil D. Baker.)

The Court: This deposition was taken at the instance of each side?

Mr. Custer: At the instance of the defendant, your Honor.

The Court: Let me have that question.

"Did you ever fill out a Confidential Statement?

"A. Yes, I did.

"No. 16. When and where did you fill this [20] out?"

The Court: A confidential statement for the deponent?

Mr. Custer: Yes.

The Court: I can't see where it is material.

Mr. Gill: I object to that question.

The Court: I have ruled. I can't see where it is material.

Mr. Gill: I ask the answer be stricken.

The Court: Let me have the question again.

(Question read.)

The Court: And the answer?

Mr. Custer: "Yes, I did."

The Court: And the next question?

Mr. Custer: "When and where did you fill this out?"

The Court: I ruled that as immaterial.

Mr. Gill: That objection goes to each.

Mr. Custer: We will omit that answer and proceed with question 17.

"No. 17. Do you know, as a fact, whether or not

(Deposition of Neil D. Baker.)

Wallace P. Gulley filled out a Confidential Statement?"

Counsel has no objection to that question?

Mr. Gill: No.

Mr. Custer (Continuing): "A. I believe that he filled out one the same time that I did because we were working in the same department there, and they told us to fill them out and I am pretty sure that we filled them out at the [21] same time."

Mr. Gill: Just a moment. I object to that answer as not responsive to the question. The question was, do you know his affairs——

The Court: Let it stand.

"No. 18. Do you recall the date, when and where he did this, if you know?

"A. I believe it was in February, 1947."

Mr. Gill: Same objection.

The Court: Objection overruled.

Mr. Custer (Continuing): "No. 19. Were you and Wallace P. Gulley working at the U. S. Marine Base at El Toro, California, on February 5, 1947?

"A. At the Staff NCO Club, at the same Base.

"No. 20. Did Wallace P. Gulley ever tell you how much insurance he had?

"A. Yes, he said he had ten thousand dollars' worth of insurance, he had ten thousand dollars' worth of National Service Insurance.

"No. 21. When and where did he tell you?

"A. We were in the back room at the Staff NCO Club, Marine Air Station, El Toro.

(Deposition of Neil D. Baker.)

"No. 22. Did he tell you who the beneficiary was of this policy?

"A. Yes, he did, he said his wife, Mary Gulley, was [22] the beneficiary.

"No. 23. If your answer to this question is yes, please state the name of the person to whom his insurance was made out, if he so stated.

"A. Mary Gulley.

"No. 24. Did he ever tell you whether he had more than one kind of insurance?

"A. No, he didn't.

"No. 25. Did he tell you whether he had insurance other than the National Service Life Insurance?

"A. No, he didn't.

"No. 26. If so, did he give you the name of the beneficiary or the amount of insurance?

"A. No."

Cross-interrogatories. These were propounded by Mr. Gill.

Mr. Gill (Reads):

"Cross-Interrogatories

"No. 1. What was your grade or rating in the armed service at the time you have said you first became acquainted with Wallace P. Gulley?

"A. I was a PFC at the time, Private First Class.

"No. 2. What was his grade or rating at that time?

"A. Wally was a PFC also.

(Deposition of Neil D. Baker.)

"No. 3. If you have stated in response to a direct interrogatory that you had a conversation with Wallace P. [23] Gulley concerning National Service Life Insurance, please state how that conversation came up, that is, who suggested the topic.

"A. Well, we were just sitting around in our quarters at the Staff NCO Club and I brought the subject up about insurance, naturally I meant Service Insurance, and I had asked Wally if he had had his insurance changed over to his wife's name, and Wally said yes, he had the insurance changed over to his wife's name, Mary Gulley.

"No. 4. Are you acquainted with the defendant Mary Jane Gulley, also known as Mary J. Gulley?

"A. Yes, I am.

"No. 5. If so, when did you first become acquainted with her?

"A. I believe it was near the end of '46.

"If so, how intimate is that acquaintance at the present time?

"A. Well, I haven't seen Mary since Wally's funeral, has been over three years.

"No. 7. State whether or not you have ever met any other members of the family of the late Sergt. Wallace P. Gulley?

"A. I met them in '47 when I took Wally's body home, I escorted his body home, I met his mother, his father, and his brother and three of his [24] sisters.

"No. 8. If so, state who they were.

"A. I just answered that question. The only

(Deposition of Neil D. Baker.)

one I knew was Bob, that is his brother, I can't remember the rest of their names.

"No. 9. If you have answered that you did meet these other members of his family, state when, where and on what occasion you met them.

"A. I have already answered that one, I said, 'I took Wally's body home and that's where I met them.' "

Mr. Custer: Your Honor, at this time we would like to offer this in evidence.

The Court: It will be admitted in evidence, modified, of course, by the ruling by the Court.

(Short recess.)

11:17 A.M.

MARY JANE WAUSON

the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Smith:

Q. Will you state your name?

A. Mary Jane Wauson.

Q. Are you a defendant in this action?

A. I am.

Q. You were formerly the wife of Wallace Phillip Gulley? A. Yes.

Q. And when and where were you married? [25]

A. We were married in Downey, California, on October 15, 1946.

Q. And Mr. Gulley died August 13, 1947?

A. Yes.

Q. And I believe we have stipulated you remar-

(Testimony of Mary Jane Wauson.)

ried on December 29, 1950? A. I did.

Q. Now on the date of his death, you were still married to Wallace? A. I was.

Q. And after you married in 1946 did you have occasion to discuss insurance with your then husband? A. I did.

Q. Would you state the circumstances, when and where this conversation occurred, who was present?

A. It was at the time I changed the beneficiary on my own insurance policy from my mother to my husband Wallace.

Q. You had an insurance policy?

A. I did.

Q. I show you a life insurance group policy No. 752100, certificate No. 1000-27520, issued by the Occidental Life Insurance Company of California, bearing date of January 29, 1947. Does that refresh your memory? A. Yes, it does.

Mr. Smith: I offer this in evidence.

Mr. Gill: Objected to, your Honor, as immaterial. There [26] is no contention that there was a bargain between these people that one was to make over her insurance in return for an assignment from the other. This is only two thousand dollars, the other was ten thousand. Whatever transaction there was between them, I can't see it has bearing in this case.

Mr. Custer: Your Honor, I believe it would be admissible for showing course of conduct on the part of the parties and also in fixing the time that they had this discussion.

(Testimony of Mary Jane Wauson.)

Mr. Smith: It is for that purpose it is offered, your Honor.

Mr. Gill: Is the assignment on that policy?

Mr. Smith: This policy is for two thousand dollars, counsel, and it shows beneficiary payable to Gulley, Wallace P., husband, as beneficiary.

Mr. Gill: And the date?

Mr. Smith: Dated January 29, 1947.

The Court: It may be admitted in evidence as defendant's Exhibit B.

DEFENDANT'S EXHIBIT B

Gift Life Insurance

Group Policy No. 752100 Certificate No. 1000-27520

Occidental Life Insurance Company
of California

Home Office—Los Angeles

This is to Certify that under and subject to the terms and conditions of Group Policy No. 752100, issued and delivered to

Bank of America
National Trust & Savings Association

(Herein called the Employer)

by Occidental Life Insurance Company
of California

(Herein called the Company)

the life of Gulley, Mary Jane (herein called the

(Testimony of Mary Jane Wauson.)

Employee) is insured for the sum of Two Thousand Dollars payable to Gulley, Wallace Phillip—Husband, as beneficiary, if death shall occur while an employee of the Employer and while insured under said policy. Such amount shall be paid either in one sum or in a fixed number of instalments as set forth in the "Optional Settlement" provisions contained elsewhere herein.

The beneficiary may be changed, in accordance with the "Change of Beneficiary" provision set forth elsewhere herein, by the employee at any time while the insurance on his or her life is in force, by notifying the Company through the Employer.

The insurance provided for by said policy terminates with the termination of employment with the said Employer, or as otherwise provided in said policy. In event of termination of employment the employee may elect to continue the insurance in accordance with the "Conversion Option" given elsewhere in this certificate.

This certificate is subject to the provisions recited on the second page hereof.

OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA.

/s/ DWIGHT L. CLARKE,
President.

Dated: January 29, 1947.

[Endorsed]: Filed June 22, 1953.

(Testimony of Mary Jane Wauson.)

Q. Now with the policy now as our exhibit, does that refresh your memory of the conversation you had with your husband on or about that time?

A. Yes, at that time he told me he was also going to change his insurance policy over to me as beneficiary.

Q. And this policy had been previously in favor of some one else? [27]

A. Yes, in favor of my mother.

Q. Now subsequent to this time, did you have occasion to discuss insurance again with your husband?

A. Yes, I did. It was several months later, approximately about two months before his death. At that time I was working in the Bank of America and the husband of one of the girls I worked with was an insurance salesman and she told me about this 20-year endowment policy and I talked it over with my husband when we went out to dinner. We were taking a walk and I told him I was thinking about taking out this insurance policy and he said he thought we were paying enough premium for insurance and without thinking I turned to him and said, "Well, you don't have any insurance" and he turned to me and said, "I do, I have ten thousand dollars in government insurance in your name." And after that I decided not to take out any insurance because his premium was $6.40 a month and he wasn't making very much in the Marine Corps and we really couldn't afford any more.

Q. You stated that he said he was paying too

(Testimony of Mary Jane Wauson.)

much money for insurance. Did he state how much he was paying?

A. He was paying $6.40 a month for the premium for his insurance policy.

Q. That is for the National Service Life Insurance policy? A. Yes.

Q. Did he hake that statement at the same time he talked to [28] you that you just related?

A. He did.

Q. And that was on this evening you walked together? A. Yes, it was.

Q. Now after his death did you go to any agency or anyone to seek advice?

A. I did. I went to the Veterans Administration in Santa Ana.

Q. What did you do there?

A. They gave me forms to fill out for his death benefits, in which was a form to apply for his National Service Life Insurance.

Q. And you filled those out, did you?

A. I did.

Q. What happened after that?

A. It was approximately a month after that I went to El Toro Marine Base with my attorney, Mr. Smith, Mr. Ridley Smith, was going to see my husband's records there and while we were there Captain Kleager in charge of the Base brought a sealed envelope from a vault in another room, which contained my husband's confidential papers, of which I knew nothing about at the time. He opened it in front of Mr. Smith and myself and it was his

(Testimony of Mary Jane Wauson.)

confidential statement and in that he stated that I was the beneficiary of his life insurance policy. I didn't know anything about it before that. [29]

Mr. Smith: If your Honor please, I have in my hand the confidential statement of Mr. Gulley, Wallace Phillip, dated February 7, 1947, which was filed in this court on June 22, 1951, as defendant's Exhibit A.

DEFENDANT'S EXHIBIT A

U. S. Marine Corps Air Station
El Toro, California

Date: 5 February, 1947.

Confidential Statement

Note: All Information Will Be Treated as Strictly Confidential. Envelope Will Be Opened Only in Case of Death or Serious Injury. This Form May Be Reclaimed Unopened, Upon Your Detachment. If Unclaimed, the Envelope and Form Will Be Destroyed Unopened.

1. Name: (Surname) Gulley, (First) Wallace, (Second) Phillip. (Rate): Corp.
2. Permanent Address: 971 Lyons Ave., Ely, Nevada.
3. Next of Kin (other than wife): Mrs. Guy A. Gulley. Address: (Street) 971 Lyons Ave., (City) Ely, Nevada, (State) Nevada.

(Testimony of Mary Jane Wauson.)

4. Name of Wife: Mrs. Mary Jane Gulley. Address: (Street) Downey Ave., (City) Downey, (State) California.

5. Marriage Certificate Located at: Long Beach, California.

6. Name of Children:.....

7. Birth certificates located at: Wells, Nevada.

8. Notify the following in case of death or serious accident:

   (1) (Name) Mrs. Mary Jane Gulley, (Relationship) Wife, (Address) Room 20, Downey Hotel, Downey, Cal.

   (2) (Name) Mrs. Guy A. Gulley, (Relationship) Mother, (Address) 971 Lyons Ave., Ely, Nevada.

   (3) (Name) .....
   (Relationship) .....
   (Address) .....

9. In case of death I desire that one of the following persons assist in inventorying my effects and notify next of kin. (Note: Next of kin will be notified by dispatch if not residing in immediate vicinity of station.)
   Name: Edward G. Smith. Rank: M/Sgt.
   Name: Charles L. Koster. Rank: T/Sgt.

10. Lawyer, Administrator or Executor:.....
    ..... (Address).....

(Testimony of Mary Jane Wauson.)

11. I hold the following insurance policies:

    (1) (Company) NSI, (Amount) $10,000.
    (Beneficiary) Mrs. Wallace P. Gulley.
    Location of Policy: .....

12. Member of Navy Mutual Air? No.

15. I have accounts at the following banks:
    (1) $340.00 at the Security First National Bank, Downey, California.

18. (Your Religion): Catholic. (Disposition of Body): Burial to take place in Ely, Nev.

/s/ WALLACE P. GULLEY,
(Signature.)

Experience has proven all the above information absolutely necessary. Answer all questions, sign, and enclose form in envelope marked with your name, rate, and the words "Confidential Statement." "To be opened only in case of death or serious illness."

Mr. Custer: Your Honor will recall at the time of this pretrial conference that this statement was admitted in evidence at that time, two years ago today.

Q. I show you defendant's Exhibit A, Mrs. Wauson, and ask you when was the first time you ever saw that?

(Testimony of Mary Jane Wauson.)

A. The first time I saw that was when I was at the El Toro Marine Base with Mr. Smith after my husband's death.

Q. Now I will ask you to examine the signature. Is that the signature of your husband?

A. It is.

Q. Mrs. Wauson, you have been a bank teller for a good many years?

A. I was a bank bookkeeper and teller.

Q. And you are familiar with persons' signatures? A. I am.

Q. And particularly familiar with your husband's signature? A. Yes.

Q. Now as a matter of fact, when we went to this Base, it was for the purpose of obtaining other records, is that correct?

A. That is correct. [30]

Q. And tell us what was done when that statement was first shown to you?

A. This Captain Kleager opened the confidential statement and he offered it to me and my attorney, Mr. Smith, objected and said that he thought that they should have copies made of it before it was presented to me and that was done and later on they mailed this confidential statement to me, after copies were made at El Toro Marine Base.

Q. And who was present at the time this was opened, this envelope with this confidential statement?

A. Captain Kleager, Mr. Smith and myself were present.

(Testimony of Mary Jane Wauson.)

Q. Captain Kleager, did he prepare copies of that in your presence? A. He did.

Q. How was that done?

A. It wasn't a copy of it exactly. He had some fellow from the Base, I don't know his rank, come in and type out a copy of it and later on there were photostatic copies made of it, before I received the original confidential papers.

Q. Now, Mrs. Wauson, that was on the 13th day of October, 1947, when you made this discovery?

A. Yes.

Q. That was the 13th of October you said that we were at the Base? A. It was. [31]

Q. 1947? A. Yes.

Q. And at that time we were investigating facts in connection with the litigation you were trying to prosecute in connection with your husband's death against the party who ran into your husband?

A. Yes.

Q. Now as soon as these copies were made, as I understand they were typed by an orderly in the presence of the custodian and yourself and myself?

A. Yes.

Q. And at that time they gave you a copy, did they, a typewritten copy, do you remember?

A. I don't believe they did. I don't remember.

Q. And then after you went home, did you write a letter to the Veterans Administration?

A. Yes, I did.

Q. Was that on the same day? A. Yes.

Mr. Johnson: This is the original Administra-

(Testimony of Mary Jane Wauson.)

tion's file. We have no objection to having it go into evidence if a copy is substituted.

The Court: If it is offered in evidence, it will be with the understanding on substitution of photostatic copy or other copy it may be returned. [32]

Q. I show you letter dated October 13, 1947, addressed to the Veterans Administration, Washington 25, D. C., and ask you, is that your signature?

A. Yes, it is.

Mr. Smith: At this time, your Honor, we offer this letter of October 13, 1947, from Mrs. Gulley to the Veterans Administration as our next exhibit.

The Court: Any objection to it, Mr. Gill?

Mr. Gill: No objection.

The Court: It may be admitted in evidence as defendant's Exhibit C.

Mr. Johnson: Your Honor, this is with the understanding that it may be removed when copy is substituted.

The Court: Yes, it may be returned to the custodian on substitution of copy, Exhibit C.

Mr. Smith: No objection. Your Honor, please, I would like to read this into the record.

(Testimony of Mary Jane Wauson.)

DEFENDANT'S EXHIBIT C

(Reads.)

"October 13, 1947.

"Veterans Administration,
Washington 25, D. C.

"In Reply to: 8BDAB

"Gentlemen:

XC 6 245 952
Gulley, Wallace Phillip

"Replying to your letter of September 30, 1947, concerning my claim for National Service Life Insurance by reason of my late husband whose name is above given, please be advised [33] that I have this date asked the U. S. Marine Corps to send you a certified copy of my husband's Confidential Statement, which is still in their files. I saw it today myself for the first time. It is dated February 5, 1947, and in it he states under item 11, Sub. 1, that he holds NSI $10,000 and names me beneficiary. I know his handwriting and the above statement is over his signature.

"He had previously told me that he had made the change in the beneficiary over to me on the National Service Life Insurance policy. We had talked about it and I made my insurance over to him at the same time. I do not understand why a regular form did not reach the proper office.

(Testimony of Mary Jane Wauson.)

"Please let me know what I am to do next about the matter.

"I have had to move from Santa Ana so please address me General Delivery, Downey, California, until I am able to obtain a permanent address.

"Yours very truly,

"/s/ MRS. MARY J. GULLEY,

"Mrs. Mary J. Gulley,
"General Delivery,
"Downey, California."

This letter, on the reverse side, appears to have been received [34] October 16, 1947; some marks I don't understand, also received Adjudication Unit A October 27, 1947, National Service Life Insurance Claims Division.

Q. Now, Mrs. Gulley, while you were there did you request the officers at the Marine Corps to send a copy of the confidential statement to any one?

A. I requested them to send a copy to the Veterans Administration in Washington.

Q. I have in my hand, Mrs. Gulley, from Headquarters Squadron, U. S. Marine Corps, Station El Toro, Santa Ana, California, over the signature of Frank C. Kleager for the commanding officer G. W. Nevils, a paper and attached to it was a typewritten copy of the confidential statement, and ask you if you ever saw that typewritten copy of the confidential statement? A. Yes, I did.

Q. And I will ask you if you saw Captain Klea-

(Testimony of Mary Jane Wauson.)

ger sign his name to that? A. I did.

Q. And that was done on the 13th of October, 1947? A. Yes.

Q. In your presence? A. Yes.

Q. And the presence of myself? A. Yes.

Q. And the presence of Captain Kleager? [35]

A. Yes.

Q. And the orderly who typed it? A. Yes.

Mr. Gill: No objection.

The Court: It may be admitted in evidence, Exhibit D.

Mr. Johnson: Your Honor, do I understand all these exhibits may be returned?

The Court: They may be returned to the custodian on substitution of photostatic or typewritten copies.

Mr. Smith: So stipulated, your Honor. Your Honor please, for the purpose of the record, I will simply read the letter:

(Testimony of Mary Jane Wauson.)

EXHIBIT D

"Hdqts. Squadron,
"U. S. Marine Corps Air Station,
"El Toro (Santa Ana), Calif.
"KV40/L13/GWN:hen
"Serial 748-12,
"13 Oct. 47.

"From: Commanding officer Headquarters Squadron U. S. Marine Corps Air Station, El Toro (Santa Ana), California.

"To: Veterans' Administration, Washington 25, D. C.

"Subj.: Statement of beneficiary case of the late Sergeant Wallace P. Gulley 504971 USMC.

"Ref.: (a) Your ltr 8BDAB over XC 6 245 952, Gulley, Wallace Phillip to Mrs. Mary J. Gulley, 2053 Cypress Street, Santa Ana, Calif., dated 30 Sep. 47.

"Encl.: (A) Certified copy of confidential statement of the late Sergeant Wallace P. Gulley, 504971, USMC. [36]

"1. As per your request, in reference (a) enclosed on his certificate true copy of Gulley's confidential statement which is in file at this office, in which he states that his wife, Mrs. Wallace P. Gulley, is the beneficiary of his National Service Life Insurance policy.

"FRANK C. KLEAGER, for
"G. W. NEVILS."

(Testimony of Mary Jane Wauson.)

On the reverse side it appears this was received October 17, 1947, Communication Division Veterans Administration—some word I can't read and a figure 46—also shows received October 21, 1947—also received October 24—SP—Service Unit. Received Adjudication Unit 4, October 29, 1947, National Service Life Insurance Claims Division.

The Court: That is Exhibit D, is it?

Mr. Custer: Yes, your Honor.

(Noon recess taken at 11:50 a.m.)

Afternoon Sesison—June 22, 1953—1:30 P.M.

MRS. WAUSON

resumes the witness stand on further

Direct Examination

By Mr. Smith:

Q. Mrs. Wauson, Mrs. Barbee gave testimony on the stand this morning that there had been some trouble between yourself and your husband. Is that true?

A. No, we were very happy. [37]

Q. Up to the time of his death?

A. That is correct.

Q. Mrs. Wauson, have you made any arrangement or any agreement between myself and Mr. Custer with relation to attorneys' fees?

A. No, I have not.

(Testimony of Mary Jane Wauson.)

Q. And have you paid both of us, or either of us, anything on account of attorneys' fees?

A. No.

Mr. Smith: You may cross-examine.

Cross-Examination

By Mr. Gill:

Q. Mrs. Wauson, I believe you said this morning that that confidential statement which was found at El Toro, that photostatic copies were made of it before it was delivered to you?

A. That is correct.

Q. How did you know that? Did you ever see the photostatic copies?

Mr. Custer: I do not think that was her testimony. The witness testified that the man who worked there at this El Toro came in and typed out a copy. There was nothing about making photostatic copies in her presence.

Mr. Gill: She said subsequently and before delivered to her, they made photostatic copies. I would like to know if she still says that. [38]

(Record read.)

The Court: What was the question?

Mr. Gill: According to my notes, she mentioned photostatic copies and she just answered that she thought they were phototastic copies and I asked her if she had ever seen them.

The Court: It doesn't appear that that is correct.

(Testimony of Mary Jane Wauson.)

Mr. Gill: Perhaps not.

Q. Then, Mrs. Wauson, the only copies that you know of being made were made by some one in typewriting there in the office, that is the only ones you saw made?

A. I didn't see them made, but there were supposed to have been copies made.

Q. Later you received one?

A. I received the original.

Mr. Gill: I think the exhibit shows otherwise, your Honor. That she received a letter from the Base with a true copy of it—that, I believe, is the exhibit C, is it not?

Mr. Custer: No, that isn't the testimony. Exhibit C says that the Captain had sent a copy to Washington, but this lady now testifies that she later received the original, which has now been introduced in evidence and admitted by your Honor.

The Court: As Exhibit A?

Mr. Custer: That is correct; on June 27, 1951.

Mr. Gill: What is Exhibit B?

Mr. Custer: Call it Exhibit A and A has now become A-1. [39]

The Court: Let it stand the same way it was. This Exhibit B is the policy.

Mr. Gill: I will withdraw the question.

Q. Then, Mrs. Wauson, the only photographic copy you know is the one you had made by Russel D. Luce at Santa Ana? You had that made, didn't you, or did you?

A. I don't remember having any copy made.

(Testimony of Mary Jane Wauson.)

Mr. Smith: I might state, your Honor, on October 24, 1950, I caused photographic copy of the confidential statement to be made and counsel was furnished with a certified copy of the photograph of the original confidential statement, so I doubt if Mrs. Wauson understands the difference between photostatic and photographic.

The Court: What exhibit number is that?

Mr. Smith: This is a photograph of A, your Honor.

The Court: Is it marked as an exhibit here?

Mr. Smith: No, it is my personal copy.

Mr. Gill: Will counsel tell me this—what was it that was sent to Washington with letter from the commander? That was a typed copy, was it not?

Mr. Smith: The exhibit is here, counsel. It says a certified typewritten copy was sent to Washington.

Mr. Gill: There never was a photostatic copy sent anywhere to any one?

Mr. Smith: No. They had no equipment for photostatic [40] at El Toro, so they had to type it.

Q. You said you went to El Toro looking for records in connection with a damage suit you had. What became of that damage suit?

Mr. Custer: That is objected to, your Honor, as wholly immaterial.

Mr. Gill: She brought it in.

The Court: Objection sustained. We are not interested in that damage suit.

Mr. Gill: We had something on that. If the

(Testimony of Mary Jane Wauson.)

Court's ruling stands, I can't ask any more questions.

The Court: What do you mean by that?

Mr. Gill: We intend to bring out that she asked her husband's mother and father to be present and when the trial came on she herself didn't show up.

The Court: I don't see what that has to do with the case. The ruling will stand. Objection sustained.

Q. Did you ever see a form requesting change of beneficiary signed by your husband?

A. No, I don't think I did.

Q. You thought there should be one?

Mr. Custer: Objected to as arguing with the witness.

The Court: Objection sustained.

Q. Mrs. Wauson, you said this morning you were a bank teller for some years, or some time? [41]

A. Yes.

Q. Did you continue to work at that during your married life? A. I was a bookkeeper.

Q. You never gave up your job while you were married? A. No.

Q. You and Wallace had no children, either before or after his death? A. No.

Q. Have you any children now, any child?

A. Yes, I have one.

Q. That is the child whose act of God caused the last postponement when we were to meet?

Mr. Custer: I object to that as absolutely immaterial.

The Court: Yes.

(Testimony of Mary Jane Wauson.)

Mr. Gill: There was a statement a couple of months ago, a statement she expected a child.

The Court: We are not interested in that. I don't see what bearing it has on this case.

Q. You have testified that there was no trouble between you and your husband during your married life? A. Yes, definitely.

Mr. Gill: That is all.

Mr. Smith: You may step down.

Mr. Custer: Your Honor please, at this time we desire to offer in evidence the affidavit which is contained in the files [42] admissible for any purpose.

Rebuttal Testimony

MRS. BETTY GULLEY

having been previously sworn, testified as follows:

Direct Examination

By Mr. Gill:

Q. You testified previously, Mrs. Gulley, that your daughter-in-law came up here for the funeral, up to Ely? A. Yes, she came.

Q. When did she return, if you recall?

A. She returned that evening on the night bus with Neil Baker, the day Wallace was buried, with Neil Baker.

Q With Neil Baker? A. Yes.

Q. That was the only occasion when you ever met Mr. Baker?

A. That's the first time I ever saw Mr. Baker,

(Testimony of Betty Gulley.)

when he arrived with Wallace's body. I had never even heard Wallace mention him or heard of him before.

Q. When your son came up on or about Mother's Day of 1947, what was said about his wife not accompanying him?

A. Well, he said he wanted Mary to accompany him but she couldn't get off from work, and he returned on Monday.

Q. Anything further?

A. Well, he said that she wouldn't accompany him and later he called her before he left and she wasn't at her place where they had rooms and he couldn't get in touch with her and they [53] told him she was in San Francisco.

Mr. Custer: No cross-examination.

MRS. BARBEE

was recalled, and having been previously sworn, testified as follows:

Direct Examination

By Mr. Gill:

Q. Now Mrs. Barbee, you testified this morning as to conversation with your brother while he was in Ely the last time. I think we were cut off there or stopped on objections. Do you recall anything that he said regarding his family life?

Mr. Custer: I am going to object to that question as calling for pure hearsay.

(Testimony of Virginia Barbee.)

The Court: Objection sustained.

Q. Did he make any statement to you regarding his desire for a home?

Mr. Custer: Objected to, your Honor.

The Court: Objection sustained.

Mr. Gill: That will be all. Plaintiff rests. [54]

State of Nevada,
County of Ormsby—ss.

I, Marie D. McIntyre, the duly appointed official court reporter in the United States District Court, for the District of Nevada, do hereby certify: That I was present and took verbatim shorthand notes of the testimony adduced in the case entitled, Betty Gulley, Plaintiff, vs. The United States of America and Mary Jane Gulley, Defendants, No. 867, at the trial held in Carson City, Nevada, June 22, 1953, and that the foregoing pages, numbered 1 to 54 inclusive, comprise a true and correct transcript of my said shorthand notes, to the best of my knowledge and ability.

Dated at Carson City, Nevada, June 25, 1953.

/s/ MARIE D. McINTYRE,
Official Reporter.

[Endorsed]: Filed June 25, 1953.

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, Amos P. Dickey, Clerk of the United States District Court for the District of Nevada, do hereby certify that the accompanying documents and exhibits, listed in the attached index, are the originals filed in this court, or true and correct copies of orders entered on the minutes or dockets of this court, in the above-entitled case, and that they constitute the record on appeal herein as designated by the parties.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 21st day of April, A. D. 1954.

[Seal] /s/ AMOS P. DICKEY,
Clerk.

[Endorsed]: No. 14328. United States Court of Appeals for the Ninth Circuit. Betty Gulley, Appellant, vs. Mary Jane Gulley, also known as Mary J. Gulley, now Mary Jane Wauson and United States of America, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Nevada.

Filed April 22, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14328

BETTY GULLEY,

Appellant,

vs.

THE UNITED STATES OF AMERICA and MARY J. GULLEY, Also Known as MARY J. GULLEY, Now MARY J. WAUSON,

Appellees.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY

Under Rule 17, subdivision 6 of the Rules of this Court the appellant hereby makes the following as a statement of the points on which she intends to rely:

1. The Court erred in sustaining objection to question asked the defendant Mary Jane Wauson on cross-examination as to what became of a damage suit she had instituted against the person who ran into her husband, causing his death, a matter which had been mentioned by her on direct examination by her attorneys.

2. The Court erred in sustaining objections to questions asked the witness Virginia Barbee on rebuttal as to whether she recalled anything the decedent had said regarding his family life, or his de-

sire for a home. Objections were on the ground of hearsay, although the defendant had testified freely and without objection on hearsay matters, what her husband had told her on several occasions.

3. The Court erred in its decision as set forth in the Opinion, Findings, etc. in seemingly holding that the confidential statement filed by the decedent with his commanding officer was in itself a change of beneficiary. Kendig vs. Kendig, 9th Circ., 170 F. 2d 750, cited in the opinion, should be distinguished from the instant case due to the existence of evidential factors in the Kendig case, e.g., testimony of disinterested witnesses or a witness that the decedent Kendig had said that he had sent in a form changing the beneficiary of his insurance, and nothing of the kind, as will be developed in brief hereafter, in the instant case.

Dated April 23, 1954.

/s/ ROBERT R. GILL,
Attorney for Appellant.

Affidavit of service by mailing attached.

[Endorsed]: Filed April 26, 1954.

No. 14328

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BETTY GULLEY,

APPELLANT,

vs.

MARY JANE GULLEY, Also Known as Mary J. GULLEY, Now MARY JANE WAUSON, and UNITED STATES OF AMERICA,

APPELLEES.

Upon Appeal from the District Court of the United States for the District of Nevada.

OPENING BRIEF FOR APPELLANT

ROBERT RICHARD GILL,
Ely, Nevada
Attorney for Appellant

INDEX

CITATIONS

CASES

MISCELLANEOUS

No. 14328

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Appellant,

vs.

MARY JANE GULLEY, Also Known as Mary J. GULLEY, Now MARY JANE WAUSON, and UNITED STATES OF AMERICA,

Appellees.

Upon Appeal from the District Court of the United States for the District of Nevada.

OPENING BRIEF FOR APPELLANT

STATEMENT OF FACTS

This is an appeal from a judgment or judgments, (there being in the Transcript of Record both a Judgment Entry in Civil Docket entered December 16, 1953, and a formal Judgment entered January 29, 1954, Tr. 24, 25-6) entered by the Honorable Roger T. Foley, District Judge for the District of Nevada, sitting without a jury, in a civil action brought by Betty Gulley, appellant herein (Tr. 3-6) to recover under a

certificate of National Service Life Insurance in the sum of $10,000 issued to her deceased son Wallace Phillip Gulley wherein she was named as the sole beneficiary. (Plaintiff's Exhibit 2, Tr. 41-42).

Mary Jane Gulley, then the widow of the decedent, and the United States of America were named defendants, she having made claim to the Veterans Administration for the proceeds of the said insurance which had been rejected by the said Veterans Administration (Tr. 5) but which had been decided in her favor by the Board of Veterans Appeals (Tr. 5, 9). A disagreement thus existed between plaintiff, appellant herein and the said Veterans Administration as to the payment of such insurance according to the terms of the certificate. Jurisdiction was conferred upon the District Court of the United States for the District of Nevada by §445 and 817, Title 38, U.S.C.A. That court having heard and determined the case adverse to plaintiff's contentions, she has the right of appeal to this Court from such determination, and has so appealed. The actual appellee therein is Mary Jane Gulley, a defendant below, whose name has been changed to Mary Jane Wauson by remarriage. (Tr. 55). The United States of America, named also as an appellee, is a mere stakeholder.

THE PLEADINGS

Those pertinent here are the complaint filed May 26, 1950 (Tr. 3-6), and the answer of the then defendant Mary Jane Gulley filed October 17, 1950. A pre-trial conference was had June 22, 1951 and the Order on Pre-Trial Conference appears in the record. (Tr. 10-12).

STATEMENT OF THE CASE

The main question involved is whether there was sufficient evidence to support the trial court's decision, set forth as its Conclusions of Law No. 1 (Tr. 22).

"That on February 5, 1947, said Wallace Phillip Gulley

took affirmative action evidencing an exercise of his right to change beneficiary by filing on said date, with Headquarters Squadron, United States Marine Corps Air Station, El Toro (Santa Ana), California, his 'Confidential Statement' containing among other matters the following: (Emphasis supplied)

"'11. I hold the following insurance policies:

(1) (Company): NSL. (Amount): 10,000. Beneficiary: Mrs. Wallace P. Gulley.'"

SPECIFICATION OF ERRORS

1. The trial court unduly limited the cross-examination of the defendant Mary Jane Wauson in the following respects:

(a) By sustaining objection to question asked the defendant as to what became of a damage suit she had instituded against the person who ran into her husband, causing his death. She had testified on direct: (Tr. 65)

> "Q. That was on the 13th of October you said that we were at the Base. A. It was.
>
> Q. 1947? A. Yes.
>
> Q. And at that time we were investigating facts in connection with the litigation you were trying to prosecute in connection with your husband's death against the party who ran into your husband?
>
> A. Yes."

And on cross-examination by the writer hereof:

> "Q. You said you went to El Toro looking for records in connection with a damage suit you had. What became of that damage suit?
>
> Mr. Custer: That is objected to, your Honor, as wholly immaterial.
>
> Mr. Gill: She brought it in.
>
> The Court: Objection sustained. We are not

interested in that damage suit.

Mr. Gill: We had something on that. If the Court's ruling stands, I can't ask any more questions.

The Court: What do you mean by that?

Mr. Gill: We intend to bring out that she asked her husband's mother and father to be present and when the trial came on she herself didn't show up.

The Court: I don't see what that has to do with the case. The ruling will stand. Objection sustained."

We were then prepared to present in rebuttal the testimony of the plaintiff if the defendant had answered the question contrary to her statement of what happened in court when the trial of that damage action came on. The defendant had a tendency to vary her testimony on cross-examination from that given on direct, and since she had mentioned that damage action, we believe we were entitled to develop her version of the outcome.

(b) In sustaining objections to questions asked the witness Virginia Barbee — a sister of the decedent — on rebuttal as to whether she recalled anything the decedent had said regarding to his family life, or his desire for a home. (Tr. 77-78). The objection being that the first question called for pure hearsay. That was true, but very much of the defendant's testimony on direct had been pure hearsay, as what her husband had told her on various occasions. (Tr. 59-60 for example.) She also testified on direct: (Tr. 71)

"Q. Mrs. Wauson, Mrs. Barbee gave testimony on the stand this morning that there had been some trouble between yourself and your husband. Is that true?

"A. No. We were very happy.

"Q. Up to the time of his death?

"A. That is correct."

We believe we should have been allowed to show by the

witness Mrs. Barbee that on the last occasion when she saw her brother alive, on or about Mother's Day of 1947, some three months before his untimely death at an age of three months short of twenty-three and less than a year after the marriage, he had mentioned matters upon which he and his wife disagreed.

If permitted she would have testified that he said, in response to a question by her if he had the insurance changed to Mary, that he was not having the insurance changed. He didn't think Mary and he would be able to get along, didn't think things were going as well as they should. She had refused to give up the room and start housekeeping. He would never change it now, but if happily married and had a family he would change the insurance. (Cf. her testimony on direct received without objection or cross-examination, Tr. 37:)

> "A. My brother told me he was having trouble with his wife and did not change his insurance; he had left it the way he had previously made it to my mother, without any contingent."

SUMMARY OF ARGUMENT

Evidence Insufficient to Sustain Decision.

There was no testimony to support allegation in answer that the insured delivered or caused to be delivered to proper officials a written form to change beneficiary from mother to wife, on or prior to February 5, 1947. Date that of confidential statement Defendant's Exhibit A. No actual evidence of when statement filed at Headquarters office. Language of allegation did not refer to confidential statement as that alleged in next paragraph. Only other reference to a form for change in letter from defendant (Exhibit C). Only testimony on subject hers on cross-examination, evasive. No finding that such a document might have been forwarded but lost. Confidential statement only writing before trial court. Baker deposition discussed compared with plaintiff's evidence as to Baker.

Analogy between comment by Court in Cohn v. Cohn and Baker deposition. List of cases cited supporting point that evidence did not justify decision below. Trial Court evidently following dissenting opinion in Bradley case but even that not full support. Exact nature of confidential personal report in Bradley case was unknown. Quotation from Kendig v. U. S. on that subject. In Bradley case a form required of all flying officers, with Army Air Force circular set out as footnote. Decedent here not a flying officer. No information as to just what the confidential form in Kendig case was but implication only to be opened on death of maker. No such implication in Bradley v. U. S. Bradley case never overruled in own circuit.

Shapiro v. U. S. one of numerous wrong form cases. Said to be held unanimously to be affirmative act and effective. Coleman v. U. S. suggested as an exception to that statement.

Gann v. Meek now discredited. Dissenting opinion of Judge Sibley in that case mentioned with approval in Kell v. United States.

Reference to later cases in 38 U.S.C.A. mainly district court cases without any great showing of careful reasoning. A notable exception Kell v. United States, affirmed in appeal. Quotations from district court opinion.

Ford v. United States, a district court case analyzed. Comment of Court upon a witness's testimony suggests the Baker deposition here. Judgment for last beneficiary of record.

Burden of proof upon claimant. Written instrument, even personal letter from insured to claimant should carry more weight than oral testimony of statements by him. Comment in annotation in ALR 2d on this class of evidence, weakest known to writer.

Oral testimony of defendant vulnerable to this criticism. Quotations therefrom. Coincidence of month of June, 1947 in her testimony and the Baker deposition. If husband told

her in January of intention to change beneficiary, why had she forgotten it by June? A woman of business training and experience, her feminine curiosity should have led her to follow up his statement.

Baker's recollection of making confidential statement by decedent at time of making deposition rather vague. Why did he not mention it to her on bus trip? When did she learn of his supposed knowledge if not on that trip?

Courts not uniform in holding as to weight to be given letters. Littlefield v. Littlefield on subject.

Watson v. United States — statement of witness that she prepared form of application for change of beneficiary, saw it signed and mailed to Veteran's Administration held insufficient to support burden of proof of such change.

Ramsay v. United States closely akin to instant case on point of facts. Quotation from annotation in 2 ALR 2d. Findings here show oral statements of insured not in accord with defendant's testimony of what he said to her.

Conclusions below not sustained by evidence. Judgments entered pursuant thereto erroneous and should be reversed.

ARGUMENT

The Evidence in Behalf of Defendant Was Insufficient to Sustain the Decision.

1. Conspicuously lacking was *any* testimony to support the allegation made in her Answer, by her attorneys for her, that is in paragraph 3 (Tr. 8) of her further, etc. defense

> ". . . . upon information and belief that the said Wallace Phillip Gulley delivered or caused to be delivered to the proper officials a written form to change the beneficiary of his National Service Life Insurance policy from that of his Mother, Betty Gulley, to his wife, Mary Jane Gulley, this defendant; and that said form was delivered on or prior to February 5, 1947."

That date is that of the confidential statement, Defend-

ant's Exhibit A (Tr. 61). Finding No. 9 (Tr. 20), i.e., that this statement was filed on that date in the office of the Headquarters Squadron is not supported by any evidence. The sealed envelope in which Mrs. Wauson testified it was found was never produced, showing filing date if any, and there were no filing marks on the document itself.

Counsel in the quotation above were not referring to this statement as the "written form to change the beneficiary" as they alleged its filling out and signing — but as will be noted *not* its filing — in the next paragraph of their answer, i.e., No. 4. The only other reference in the record to a form for changing the beneficiary of the decedent's insurance is in a letter written by this defendant to the Veteran's Administration (Defendant's Exhibit C, Tr. 67) and that an extremely nebulous one:

> "I do not understand why a regular form did not reach the proper office."

Not a statement that such a form had been prepared and forwarded, nor even that her husband had told her he had done so. Whence, we would inquire, counsel's "information and belief," supra? Her letter was dated October 13, 1947, the day she says the confidential statement was found in the records at the Base. It refers to a letter from the Veterans Administration of September 30, 1947, which counsel did not read into the record, although they were using the government's file at the time, (Tr. 65, last line), and the writer hereof did not have access to it. The only testimony relative to a form requesting change of beneficiary is hers on cross-examination by the writer: (Tr. 75)

> "Q. Did you ever see a form requesting change of beneficiary signed by your husband?
>
> "A. No, I don't think I did."

This answer, we submit, was evasive, and should have been a simple negative. She was not a simple housewife, but a woman of business experience, a bank bookkeeper and teller,

for a good many years (Tr. 64). If she had seen a form of such vital importance she would have remembered it. She did not see it, in our opinion, because it never existed. The trial court made no finding nor implied finding that such a document might have been made and forwarded but lost. Therefore its decision must have been based on the theory that the confidential statement in itself constituted a change of beneficiary. The Courts have uniformly held that there must be a writing, and this was the only writing before it. The testimony of the defendant and the deposition of the witness Neil D. Baker (Tr. 49) as to what the decedent had told them would be insufficient to show that there had been a change of beneficiary.

It will be noted that Baker said that the conversation with Wally took place in June of 1947, and that he himself brought up the topic. Cf. the testimony of the witnesses Guy William Gulley and Virginia Barbee as to what their brother told them in the previous month. (Tr. 32 and 37). Cf. also the testimony that Wallace Phillip Gulley had never mentioned Baker to his mother (Tr. 77); that he was selected by the defendant as the escort for her husband's body to Nevada (Tr. 48); and that she returned the evening of the day of the funeral on the same bus with Baker; together with the fact that he was not named by the decedent under paragraph 9 of the confidential statement as one of the persons to assist in inventorying his effects, etc. The writer wonders why he should have evinced such an interest in Wallace's personal affairs.

It recalls the Court's comment in Cohn v. Cohn (CCA Dist. Col.), 171 F2d 828, headnotes 2-3:

> "Moreover, we are impressed by the insistent part played by the key witness for appellee Cohn in this matter. He testified 'I had often talked to Herbie (Cohn) about changing his insurance'; 'I told Herbie if he was going to change it now would be a darned good time for him to do it; and I got the blanks and

gave him one and I kept one.' Again, this witness testified that upon one occasion when Cohn, late for a flight, handed him a 'confidential sheet' (indicating the desired disposition of his effects) 'and asked me to put it in the envelope, which I did, he' (the witness) 'checked the sheet to see if he had signed it,' and 'It named Helene Cohn as the beneficiary for all purposes.' All these circumstances create an atmosphere which illustrates the necessity that any change in the formally designated beneficiaries of these policies be evidenced by some unmistakable proof that the decedent did make the change, the reasonable and in our view, necessary proof is a writing, which if not currently existing, should be proved by the well-established rules for making such proof."

In that case, as in this, no written evidence of change of beneficiary was produced. Judgment for wife in the court below reversed, with directions. Substituting Neil D. Baker for the unnamed witness in the Cohn case, much of the excerpt above might have been written with the instant case in mind. Baker was defendant's key witness, and played a very insistent part: (Tr. 49)

> "A. * * * the subject of insurance was brought up, I believe I brought it up, and asked Wally if he had had his insurance changed, and he said, 'Yes,' that he had had his insurance changed to his wife's name."

> "A. Well, I asked him about his insurance, we brought that up some way, I don't know just how it came up but I had asked him if he had his insurance changed over to his wife's name, as I said before." (Tr. 50)

> "A. Well, we were just sitting around in our quarters at the Staff NCO Club and I brought the subject up about insurance, naturally I meant Service Insurance, and I had asked Wally if he had had his insurance changed over to his wife's name, and Wally said yes, he had the insurance changed over to his wife's name, Mary Gulley." (Tr. 54)

To this point that the evidence did not justify the decision that there had been a change of beneficiary, in addition to the District Court case of *Cohn v. Cohn,* supra, we cite the following authorities; among others:

Bradley v. United States (CCA 10), 143 F2d 573;

Butler v. Butler (CCA 5), 177 F2d 472;

Coleman v. United States (CCA Dist. Col.), 171 F2d 829;

Ramsay v. United States (DC Fla.), 72 F. Supp. 613;

Kendig v. Kendig (CCA 9), 170 F2d 750;

Ford v. United States (DC ED Tenn.) 94 F. Supp. 223;

Kell v. United States (DC WD La.), 699, affirmed 202 F2nd 143;

Watson v. United States (CCA 5), 185 F 2nd 292.

The court below appears to have followed the minority or dissenting opinion in the Bradley case. Even that does not fully support the decision. (Tr. 14). Exactly what the "confidential personal report" therein mentioned may have been does not anywhere appear. Judge Foley says that it was executed by the insured and filed with the Headquarters of the 57th Pursuit Group, etc. The opinion of Judge Muragh (Tr. 14) refers to it as having been executed by the insured, addressed to and filed with his group headquarters. This Court in the *Kendig* case, supra, said at page 751 of 170 F2d:

> "In Bradley v. United States, 10 Cir. 143 F2d 573, a confidential statement of *this type* (i.e. of the type in the Kendig case) "was held by a divided court to be insufficient evidence of a change of beneficiary. However, the court considered the statement only from the standpoint of its representing in and of itself an attempt to effect the change. Here, as already noted, there was a testimony of the insured's having told his brother that he had sent in a form changing the beneficiary. The confidential statement tends at least to substantiate this declaration. It is

not inconceivable that such a form was actually sent but became lost or misplaced in the files of administration." (Emphasis supplied)

A confidential statement of what type? Nowhere in the published opinions is its language set out. In the Bradley case opinion on page 574 it is referred to as a " 'confidential personal report' required of all flying officers," etc., and the Army Air Force Circular establishing a file of such reports is set out in full as Footnote 1 to that page. Where was there any evidence that the confidential statement under consideration here *was required* of anyone? There is no evidence that the decedent Wallace Phillip Gulley was a flyer, and obviously he was not an officer in the sense the word is used above. The filing may have been optional.

Just what the form in the Kendig case was we are not informed, but the reference in the opinion to Kendig's having been aware "of the inexorable circumstances under which, only, the document would be opened and read" is an implication that it would be opened only on the death of the maker. There is no such inpplication as to the form in the Bradley case. It apparently became an official record forthwith.

Bradley v. U. S. has been distinguished by various courts, but never overruled to our knowledge in its own Circuit. Even the majority opinion is cited in support of decisions both ways, that is, akin to appellant's contention here, or to that of the appellee.

The trial court here in its opinion, etc. (Tr. 15-16) quoted from one other case, *Shapiro v. United States,* 2 Cir., 166 F. 2nd 240, besides the *Kendig* case already mentioned. The Shapiro case was one of the numerous "wrong form" cases, i.e., the use of W.D., A.G.O. Form No. 41, designed for another use. It has been said that the courts have been unanimous in holding that where such forms were mistakenly used for designating a change in the beneficiary of an insurance policy it was an affirmative act and effective for that purpose.

In a recent decision it was pointed out that a reissue of this form in 1943 carried a warning note that it did not apply to insurance. Perhaps the word unanimous should not have been used. In *Coleman v. United States* (CCA Dist. Col.), 176 F2d 469, there was both a GO 41 form signed, contents not stated, and a Government Insurance Report form addressed to the wife of the officer in which he said "On date of Oct. 1, 1943 I took out $10,000 (National Service Life Insurance) (United States Government Insurance) naming you as my beneficiary. To cover the cost of this insurance I have authorized a monthly deduction from my pay of $6.50."

There was no proof that any change of insurance beneficiary form had ever been signed or asked for. The officer was killed in action overseas on March 23, 1944. The appellate court found that the trial court had set out a correct analysis of governing principles of law. Judgment for the mother, the original beneficiary, affirmed.

In the now somewhat discredited case of *Gann v. Meek* (CCA 5), 165 F2d 857, which the same court refused to follow in *Butler v. Butler,* 177 F2d 472, a letter written by a semi-illiterate corporal of Marines to a third party, his brother, to the effect that he had changed his insurance beneficiary was held sufficient to evidence such a change. The majority opinion indulged in considerable melodramatics to justify the decision. The mordant dissenting opinion of Judge Sibley, mentioned with approval by Judge Porterie in *Kell v. United States,* discussed hereinafter, seems to us very much in point. We quote the concluding paragraph on page 862:

> "Are we to invent rules of evidence applicable only to soldiers in time of war? Are we to imagine 'the maelstrom of carnage and death' on the Island of Saipan had anything to do with this matter, where it appears only that the soldier was on Saipan nine weeks later, and it does not appear where he was when he said he had changed his insurance? We carry romantics too far in doing so."

THE LATER CASES

In the course of preparation of this brief we have read the cases cited to the topic of Change of Beneficiary in the reissue of 38 U.S.C.A. In the main they are district court cases, blindly following precedent in the Circuit Courts with no great showing of careful reasoning. A notable exception is *Kell v. United States* (DC WD La.), 104 F. Supp. 699, affirmed with commendation for its statement of the principles of law in 202 F 2nd 143. It appears to us deserving of comment and quotation.

The facts show that the insured, a member of the crew of a destroyer, in a letter written to his wife from a home port fifteen days after marriage, said, "I had my insurance changed to your name." Four other letters were written within the next three months, the last eleven days before his death of December 18, 1944, when the ship was lost in a typhoon in the China Seas with only six survivors, but none mentioned insurance. The Veterans Administration paid installments of the insurance to his mother, the original beneficiary, until a demand was made by the wife based on the letter of September 30, 1944, first above referred to, when payments were suspended pending court action. We quote from page 703 of the district court opinion:

> "We have compared the facts of this case with the facts of all those cases cited to us and others found in our research. We believe that to permit the plaintiff in this case to prevail, under her facts, would be going out further than has ever been done before in those cases cited to and found by us.
>
> "We analyze and compare cases; this is a part of the science of jurisprudence. The question at issue here is when has there been and when has there not been a change of beneficiary. The only safe procedure for the court is not to lose itself in the analysis of cases; it should, once in a while, come back to the statute and the regulations thereunder — not to be led astray therefrom by the charityof expression by which

a Court may be moved in each case of this character.

". . . Seriously, what is the more to be condemned is that the Court is legislating when it leaves clear and unambiguous meaning of the statute and the regulations. Step by step, case by case, one gets further and further away from the statute and the regulations; until they are all but gone!

". . . We will sign a judgment consistent with the above in favor of Mrs. Davis and the United States, upon presentation."

Ford v. United States (DC ED Tenn.), 94 F. Supp. 223, was an involved case, the mother the first beneficiary, a change to the wife of record, and a claim by the mother of a second change to her. On page 224 the court says that the principal witness for the plaintiff was one King, a fellow (army) officer of the insured, who served with him in the European Theatre of Operations. He testified to an intimate acquaintanceship, that they at times bunked together, and that he had been treated by the insured as a confidant with respect to his married life, that the insured had told him he was unhappily married and intended to divorce his wife and change the beneficiary of his insurance from his wife to his mother. After returning from a mission shortly before the insured's death, the witness was told by him that he had changed the beneficiary. After commenting on the vagueness of this witness's testimony, which appeared to have become more definite when he was recalled on direct after a court recess, the opinion says, in language which seems to us applicable in a lesser degree to the deposition of the witness Baker in this case:

"The testimony of King is of more significance as negative than as positive testimony. Nothing was said indicating that King saw the insured sign any papers purporting to designate a change of beneficiary, or that he saw any such papers in the insured's possession, or that he accompanied the insured to any office or post for the purpose of obtaining or signing any papers relative to insurance. Nor is there anything in the testi-

mony as to what the insured did by way of affecting a change of beneficiary."

Judgment was in favor of the wife, the last beneficiary of record.

With the burden of proof upon the party claiming a change of beneficiary, as so often held by the courts, both the *Kell* and the *Ford* cases seem to us much stronger for such claimants than the instant case. Surely a written instrument, even a personal letter written by the insured to the claimant should carry more weight than her statement, as here, of what the insured told her.

In 2 ALR 2d, at page 500, in an annotation on the subject of change of beneficiary, §8, Letters to, or testimony of, substituted beneficiary, the following appears, which was set out as a footnote to the *Kell* case in the opinion previously mentioned:

> "The evidence which this writer would consider the weakest is the testimony of, or letters written to, the substituted beneficiary. The weakness of such evidence lies in the fact that the insured may, for some reason or other, see fit to indicate either in conversation with, or letters to, the person vitally interested in the change, that he had attempted to effect such change, although actually he never contemplated such a change. Obviously, such evidence lends itself also easily to fraud."

The oral testimony of the defendant on the trial seems to us especially vulnerable to this criticism. Since under the new rules pleadings are not required to be verified, she can scarcely be held responsible for what her counsel say in her answer, the further, separate and affirmative defense (Par. 2, Tr. 8) that "about two months after the marriage . . . . . the said Wallace Philip Gulley advised the defendant, his wife, that he had made a change of beneficiary," etc. Two months after the marriage would be on or about December 15, 1946. Now what was her testimony on the subject? In

effect, that there were two conversations and no more, and only in the second did he say that he had made such a change: (Tr. 56, 59)

> "Q. And after you married in 1946 did you have occasion to discuss insurance with you then husband?
>
> A. I did.
>
> Q. Would you state the circumstances, when and where this conversation occurred, who was present?
>
> A. It was at the time I changed the beneficiary on my own insurance policy from my mother to my husband, Wallace."

Following this, over objection by the writer, an insurance policy directly naming her husband as beneficiary was admitted in evidence as Defendant's Exhibit B, dated January 29, 1947, approximately three and a half months after the marriage. The direct examination continued:

> "Now with the policy now as our exhibit, does that refresh your memory of the conversation you had with your husband on or about that time?
>
> A. Yes, at that time he told me he was also *going to change* his insurance policy over to me as beneficiary." (Emphasis supplied.)

And four lines further down the same page (Tr. 59):

> "Q. Now subsequent to this time, did you have occasion to discuss insurance again with your husband?
>
> A. Yes, I did. It was several months later, approximately two months before his death. At that time I was working in the Bank of America and the husband of one of the girls I worked with was an insurance salesman and she told me about this 20-year endowment policy and I talked it over with my husband when we went out to dinner. We were taking a walk and I told him I was thinking about taking out this insurance policy and he said he thought we were paying enough premium for insurance and without

thinking I turned to him and said, 'Well, you don't have any insurance' and he turned to me and said, 'I do, I have ten thousand dollars in government insurance in your name'....."

Approximately two months before Wallace Philip Gulley's death would be some time in the month of June, 1947. Cf. the statement in the Baker deposition that the one conversation in which the decedent told Baker that he had had his insurance changed to his wife's name "was in June of '47." (Tr. 49) It looks as though there had been a synchronization of dates there.

Going back to her testimony, if her husband had told her on or about January 29, 1947 that he "was going" to change his insurance policy over to her as beneficiary, why, even without thinking, did she tell him perhaps four months later that he didn't have any insurance? Remembering always that she was a young woman of business training and experience, plus her normal woman's curiosity, would she not have followed up that earlier statement by asking him if he had made such a change, and perhaps how? Why should the subject have slipped her mind entirely in that comparatively short time?

Again as to Baker, if he recalled, even rather vaguely, (Tr. 52) at the time of giving his deposition, that the decedent had filled out a confidential statement in February, 1947, would he not have had the same recollection in mind on that bus trip back from the funeral in August, 1947, and if so, why did he not mention the existence of such a document to her then, and not leave it to be discovered by accident on October 13, 1947? One wonders when the defendant learned that Baker knew or purported to know something about her late husband's insurance, a personal matter, if not on that trip together. The record is utterly silent on that subject.

It has been suggested hereinabove that letters should carry more weight than statements of conversation. As to

how much weight they should carry the courts are not entirely in accord. In *Littlefield v. Littlefield* (CCA 10), 194 F. 2d 695, three letters from the insured to his parents, the first stating an intention to change the beneficiary from his wife to his children, the second that he had not changed the beneficiary but would do so that week, and the third, written from Belgium November 11, 1944, nine days before the insured was reported missing in action, later determined as killed, that on November 10, 1944 he had changed the beneficiary to his father "so that he can see the kids get their share," were held admissible for the purpose of showing an intent upon the part of the insured to change the beneficiary, but not admissible for the purpose of showing he had changed the beneficiary.

In *Watson v. United States* (CCA 5) 185 F. 2d 292, the case was a stronger one for the claimant wife than in the case before the Court. There was evidence by a witness, the insured's secretary, who claimed to have not only seen but to have prepared, seen signed by Dr. Watson and mailed to the Veterans Administration an application for change of beneficiary. She testified that applications for reinstatement of the insurance and for change of beneficiary had been prepared and signed, that she typed the wife's name in on the latter form and had mailed them. The policy was reinstated and in force at the time of the insured's death, but the files of the Veterans Administration, as here, disclosed no application for change of beneficiary, and her evidence was held in sufficient to support the burden of proof of such change. Decision below in favor of a sister, the original beneficiary, affirmed.

To us the instant case seems closely akin on point of facts, but weaker, in that there are no letters nor corroboration of the defendant's testimony, to that of *Ramsay v. United States,* (DC Fla.) 72 F. Supp. 613, cited in the annotation in 2 ALR 2d at page 501, from which we quote the language relative to the holding. There was testimony of the wife and her mother as to a statement by the insured that he had

changed his government insurance to name his wife as beneficiary, a letter from him to his wife stating that he did not know why she had not received the certificate of insurance, another letter to her referring to his insurance as payable in installments instead of a lump sum, and statements to brother officers that he had changed his insurance to his wife but did not know whether or not she would receive the insurance because the Veterans' Bureau apparently did not have his change of beneficiary properly recorded and that he had not received any answer or confirmation of the change from the Bureau. There were also photostatic copies of the official service records docket of the insured which showed that he had designated his wife as next of kin and as beneficiary for naval benefits accruing in case of death. We quote from page 501 of the annotation, second column:

> "Holding that the wife had failed to carry the burden of proof to show that the insured did everything in his power to effectuate the change in beneficiary, but that the evidence persuasively showed that the insured took no steps to change his beneficiary, the court said that the law will not permit to consider that done which should have been done and that the evidence showed too clearly that the insured could never bring himself to the point of changing the beneficiary of his insurance from his mother to his wife and that the insured would have had ample opportunity to effect such a change if he had desired or dared to do so. The court distinguished the cases of Roberts v. United States, ... 157 F. 2d 906 ..... and Collins v. United States, ... 161 F. 2d ..... on the ground that in those cases there was evidence that the insured actually executed a request to change the beneficiary."

In the instant case there were findings of oral statements by the insured not in accord with defendant's testimony of what he had said to her (Tr. 21, Findings 10 and 11).

> "10. That a few days after Mother's Day in May, 1947, decedent . . . stated in substance to his brother, Guy William Gulley, as follows:"

11. That decedent did state on or about Mother's Day in 1947, to his sister Virginia Barbee in substance as follows:"

The latter finding is especially positive. Not that there was testimony to that effect, but the decedent did so state. The Conclusions of Law there following are that the first conversation testified to by defendant constituted a first manifestation of the insured's intention to change beneficiaries (Tr. 22, No. 1) and that his filing, on February 5, 1947 of the Confidential Statement quoted was the affirmative action evidencing the right to change beneficiary. (Id., No. 2.) Presumptively this was the only affirmative action the trial court concluded was shown. Therefore, in the language of this Court in the Kendig case, supra, Judge Foley considered the confidential statement as "representing in and of itself an attempt to effect the change." To us he seems to have gone further than that, and held that it was in itself such a change. If so, paraphrasing the language of the Kell case, supra, he went out further than has ever been done before in those cases found by the writer hereof.

SUMMATION

We respectfully submit that the evidence below did not sustain Conclusion of Law No. 2 that the insured Wallace Phillip Gulley by filing the confidential statement therein referred to took affirmative action evidencing an exercise of his right to change the beneficiary of his insurance, or Conclusion of Law No. 3 that the defendants Mary Jane Gulley, then Mary Jane Wauson, and the United States of America were entitled to judgment. Hence the two judgments entered pursuant thereto, differing in some slight degree with reference to costs and attorney's fees, were erroneous and should be reversed.

ROBERT R. GILL,
Attorney for Appellant.

No. 14,328

United States Court of Appeals
For the Ninth Circuit

BETTY GULLEY,
Appellant,

vs.

MARY JANE GULLEY, also known as Mary J. Gulley, now Mary Jane Wauson, and UNITED STATES OF AMERICA,
Appellees.

Upon Appeal from the District Court of the United States for the District of Nevada.

BRIEF OF APPELLEE MARY JANE WAUSON, FORMERLY MARY JANE GULLEY.

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Subject Index

Table of Authorities Cited

Cases

Rules

Texts

No. 14,328

United States Court of Appeals
For the Ninth Circuit

BETTY GULLEY,

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MARY JANE GULLEY, also known as Mary J. Gulley, now Mary Jane Wauson, and UNITED STATES OF AMERICA,

Appellees.

Upon Appeal from the District Court of the United States for the District of Nevada.

BRIEF OF APPELLEE MARY JANE WAUSON, FORMERLY MARY JANE GULLEY.

STATEMENT OF FACTS.

On April 12, 1950, the Board of Veterans Appeals made its decision and final determination wherein it held that Mary Jane Gulley one of the appellees herein, was the beneficiary of the National Service Life Insurance policy of her deceased husband Wallace Phillip Gulley.

Betty Gulley the mother of the deceased being dissatisfied with the ruling of the Veterans Arministration Board of Veterans Appeals, thereupon filed in the U. S. Court for District of Nevada an action claiming that she was the beneficiary of said policy, rather than the said Mary Jane Gulley.

The policy involved was taken out while the said Wallace Phillip Gulley was a single man. He thereafter married the defendant herein, Mary Jane, on October 15, 1946 in Los Angeles County, California and died August 13, 1947. On or about the 29th day of January 1947, the said Gulley had a conversation with his wife Mary Jane and told her that he intended to change his National Service Life Insurance Policy and make her the beneficiary thereof, she having made him the beneficiary of a group insurance policy which she held by reason of her employment (Defendant's Exhibit "B" Tr. 57) on or about that date. Approximately two months before his death, which would be around the month of June 1947, there was another conversation between Wallace and Mary Jane Gulley, his then wife, concerning insurance and at that time he told her, "I do have $10,000.00 government insurance in your name" (Tr. 59). He also advised his friend in the Marine Corps, Neil Baker, that he had $10,000.00 National Service Life Insurance and that he had changed the former beneficiary thereof to his wife Mary Jane.

The appellee Mary Jane introduced in evidence the original "Confidential Statement" executed by the then Corporal Wallace Phillip Gulley at the U.S.

Marine Corps Air Station, El Toro, California, on February 5, 1947 (Defendant's Exhibit "A" Tr. 61).

The appellant relied upon the original insurance policy which was introduced in evidence, she did not introduce any documentary or any oral evidence to show that her son had again named her as beneficiary of his National Service Life Insurance after having named his wife as the beneficiary.

THE PLEADINGS.

Complaint was filed in the U. S. District Court for the District of Nevada on May 26, 1950 (Tr. 3) and the answer of the appellee Mary Jane Gulley (Wauson) was filed October 17, 1950. The order on the pretrial conference appears in the record (Tr. 10-12). Judgment was entered in favor of Appellee Mary Jane Gulley (Wauson) by the U. S. District Court on January 29, 1954 (Tr. 24, 25, 26).

STATEMENT OF THE CASE.

The question before this Court is whether or not the Appellee Mary Jane Gulley (Wauson) has established the requirements to entitle her to judgment that she is entitled to the proceeds of the National Service Life Insurance Policy by:

1. An intent on the part of decedent to make his wife the beneficiary of the policy.

2. An affirmative act on the part of the decedent Wallace Phillip Gulley to change the beneficiary of his insurance policy so as to make his wife the beneficiary.

ARGUMENT.

1. APPELLANT CONTENDS IN HIS FIRST SPECIFICATION OF ERROR, THAT THE COURT UNDULY LIMITED THE CROSS-EXAMINATION OF THE DEFENDANT MARY JANE GULLEY (WAUSON).

It is respectfully submitted that the trial Court's ruling was correct and the objection was properly sustained.

> "Introduction of irrelevant evidence upon one side without objection does not justify the introduction of irrelevant evidence on the other side."
>
> *San Diego Land etc. v. Neale* (1888), 78 Cal. 63, p. 76, 20 Pac. 372, 3 L.R.A. 83;
>
> 20 *Am. Jur.* 262.

---

2. APPELLANT'S SECOND SPECIFICATION OF ERROR WAS THAT THE COURT IMPROPERLY SUSTAINED OBJECTIONS TO QUESTIONS ASKED THE WITNESS VIRGINIA BARBEE (TR. 77-78).

It is submitted that the trial Court ruled correctly in sustaining the objections.

> *San Diego Land, etc. v. Neale* (1888), 78 Cal. 63, p. 76, 20 Pac. 372, 3 L.R.A. 83;
>
> 20 *Am. Jur.* 262.

3. **ALTHOUGH NOT CLEARLY INDICATED IN APPELLANT'S BRIEF IN WHICH IS SET OUT THE SPECIFICATION OF ERRORS, IT APPEARS THAT APPELLANT'S MAIN CONTENTION AND SPECIFICATION OF ERROR IS THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE TRIAL COURT'S DECISION, SET FORTH AS ITS CONCLUSION OF LAW NO. 1 (TR. 22).**

It is elementary that where there is evidence sufficient to support the findings and judgment of the trial Court, that they will not be disturbed on appeal.

> Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. provides that in an action tried without a jury, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial Judge to judge the credibility of the witness."
>
> *Boring v. U. S.,* 181 F. 2d 931-932;
>
> *Widney v. U. S.,* 178 F. 2d 883;
>
> *McKewen v. U. S.,* 165 F. 2d 761-765.

The intent of the husband to change the beneficiary of his insurance policy to his wife is not only supported by her testimony (Tr. 59) but is further supported by three separate statements, two oral (Tr. 49, 52-57) and one written (Tr. 61), that he had made his wife the beneficiary of this policy.

First. He told his wife that he intended to do so. (Tr. 59.)

Second. About two months before his death in a conversation about her insurance, and at that time, he told her "I have $10,000.00 in government insurance in your name". (Tr. 59.) He also told Neil Baker, a fellow Sergeant with whom he was quartered at the

Non-Commissioned Officers Staff quarters at the El Toro Marine Base, that he, Gulley, had his National Service Life Insurance changed over to his wife's name (see deposition of Neil Baker and Reporter's Tr.).

Third. On February 5, 1947, Wallace Phillip Gulley, completed and signed a form provided by the U. S. Marine Corps and known as a "Confidential Statement"; upon completion of this Confidential Statement, it was sealed and delivered to the proper officers of the Marine Corps and there filed with the understanding between Gulley and the Government that it would not be opened except in the case of the death of the said Wallace Phillip Gulley. In the Confidential Statement the appellee Mary Jane Gulley was named as the beneficiary of the $10,000.00 National Service Insurance Policy (Defendant's Exhibit "A").

The evidence mentioned in *First* established the necessary element of *intent.* The evidence under *Second* and *Third* not only corroborates the intent, but also established the affirmative acts required to effectuate the intent. Apparently Gulley and Baker each filled out their respective Confidential Statements required by Government at the U. S. Marine Corps Air Station at El Toro, California, on the same date, they having both been given the forms to complete at the same time. Neil Baker was a non-commissioned officer (Sergeant U.S.M.C.) and had no interest in the policy and was a truly disinterested witness, in spite of the reprehensible and speculative remarks in innuendo of adverse counsel.

There are two decisions by this Honorable Court wherein the facts in the cases were almost identical with the case on appeal, namely:

Kendig v. Kendig, 170 F. (2d) 750;
Downing v. Downing, 175 F. (2d) 40.

Appellee submits that these two cases are controlling, however, appellee submits that there are numerous other decisions from Circuit Courts which follow the same reasoning of this Honorable Court in cases of similar character, namely:

Roberts v. U. S., 4 Cir. (1946), 157 F. 2d 906;
Mitchell v. U. S., 5 Cir., 165 F. 2d 758;
McKewen v. McKewen, 5 Cir., 165 F. 2d 761;
Shapiro v. U. S., 2 Cir., 166 F. 2d 240;
Rosenschein v. Citron, D.C. Cir., 169 F. 2d 885;
Flood v. U. S., 3 Cir., 172 F. 2d 221;
Fairmakis v. Fairmakis, D.C. Cir., 172 F. 2d 291.

It is therefore respectfully submitted that the judgment of the United States District Court for Nevada should be affirmed.

Dated, September 1, 1954.

RIDLEY C. SMITH,
OLIVER C. CUSTER,
Attorneys for Appellee Mary Jane Wauson, formerly Mary Jane Gulley.

No. 14328

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

BETTY GULLEY,
Appellant,

vs.

MARY JANE GULLEY, Also Known as MARY J. GULLEY, Now MARY JANE WAUSON, and UNITED STATES OF AMERICA, *Appellees.*

Upon Appeal from the District Court of the United States for the District of Nevada.

PETITION BY APPELLANT FOR REHEARING

ROBERT RICHARD GILL
Ely, Nevada
Attorney for Appellant

No. 14328

UNITED STATES COURT OF APPEALS

NINTH CIRCUIT

BETTY GULLEY,
Appellant,

vs.

MARY JANE GULLEY, Also Known as MARY J. GULLEY, Now MARY JANE WAUSON, and UNITED STATES OF AMERICA, *Appellees.*

Upon Appeal from the District Court
of the United States for the District of Nevada.

PETITION BY APPELLANT FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

BETTY GULLEY, the appellant above named, presents this, her petition for a rehearing in the above entitled cause, and in support thereof, respectfully shows:

I

The Court, in its majority opinion of affirmance filed herein on March 13, 1956, has clearly failed to follow the oft-expressed rule that each insurance case must be decided in the light of its own facts. (E.g., *Mitchell* v. *U. S.*, 5th Cir. 1948, 165 F2d 758, 2 ALR2d 484, and annotation following.)

II

The case of *Kendig* v. *Kendig*, 9th Cir. 1948, 170 F2d 750, differs so materially in its facts as not to be an authority for affirmance here. We find that the so-called "confidential statement" referred to in that case is not now available as a photostat copy of that report, the only copy used on the trial below, was withdrawn by counsel. A painstaking perusal of the 106 page Transcript of Record on appeal reveals the startling fact that this report was never before this Honorable Court. Hence the references thereto by Judge HEALEY in that case, and by Judge ORR in the majority opinion in this case, lose much of their forcefulness. We invite particular attention to the former case at page 751, where Judge Healey said:

> "*We understand it to be the practice* at the United States Naval Air Stations to have these confidential forms filled out by each officer upon his reporting for duty. The statement is then sealed and placed with the officer's record to be opened only in the event of the death or serious injury of the officer concerned." (Emphasis supplied.)

How and why did the Court so understand? Not from testimony in the Transcript of Record, for there is none.

Also to Judge Orr's language in the instant case, p. 3 of the advance opinion:

> "An *identical statement* was characterized in Kendig, supra, at page 251" (apparently a typographical error for 751) "as", etc. (quoting from that opinion). (Emphasis again supplied.)

Judge Healey had also referred to a confidential statement of the same type in the case of *Bradley* v. *United States*, 10 Cir. 143 F2d 753. The document in that case was a confidential personal report required of all flying officers, with the Army Air Force Circular establishing a file of such reports set out in full as a footnote to page 754.

It does appear from the Kendig Transcript of Record that the document there was identical in one respect with the confidential statement here. (Page 97) The plaintiff was invited to read certain language from a photostat copy as the remaining part of Sheet 1, beginning with the words "I hold the following insurance policies;"

> "Answer: The name of Company; Government; amount, $10,000; beneficiary, Wife: Location of Policy: *Phoenix, Arizona, with Mrs. Mary Kendig.*" (Emphasis supplied.)

Lt. Kendig thus clearly identified the policy referred to. Cf. the confidential statement here, where the decedent left that portion of an identical heading entirely blank. To us the dissenting opinion language that a confidential statement "in many cases may in fact actually be a statement made only for the reason that the marine has a present intention to change his beneficiary" seems peculiarly apt. He may even have

then had in mind taking out another policy in favor of his wife.

III

The case of *Aguilar* v. *United States*, 9th Cir. 1955, 226 F2nd 414, decided subsequent to the presentation of our appeal, likewise differed so materially in facts as not to be an authority for the affirmance here.

Aguilar was a member of the Air Force, a newly created separate branch. Rank or rating not shown, and as in the instant case, it does not appear that he was a flyer. Extracts from two letters in the opinion by Judge Orr do not indicate his "possessing the degree of literacy required of an officer" as Judge Lee said of the United States Air Corps in *Mitchell* v. *U. S.*, supra. His unsophistication is apparent, it seems to us, in that Aguilar asked his brother, also a veteran, what steps should be taken in order to effectuate a change of beneficiary in his insurance. Prudence should have directed an inquiry of his commanding officer or of the equivalent of a top sergeant in his group. Further differentiating, it seems quite likely that Aguilar's was what we have called a wrong form case, the execution of a paper dealing with gratuities or allotments, and no more. How else can his quoted second letter be explained?

> "You don't have to fill out any papers at all, cause I have straightened everything out. *You will start getting a check next month.*" (Emphasis supplied.)

However that may have been, Judge Orr said of these two letters:

> "No more competent evidence of an affirmative act having been taken could have been produced short of the production of a written instrument containing the change. The production of evidence of this dignity, the courts have said, is not required, *if other competent evidence convinces the trier of the facts that such an instrument at one time was executed.*" (Emphasis supplied.)

Nowhere in our case, we submit, is there a word indicating that Judge Foley was so convinced. He based his conclusions on other grounds. On the contrary, there was and is persuasive evidence in the record that no such instrument was in probability executed. Pltfs Exhibit 3 (Tr. 44) is a blank form for Change of Beneficiary, United States Government Life Insurance, and we invite attention to the printed instruction thereon:

> "This form, when completed, should be immediately forwarded WITH THE POLICY to the Veterans Administration for endorsement of change of beneficiary."

Although perhaps not strictly apparent of record, the policy was at all times in the possession of the beneficiary, the appellant here. She produced it on the trial (Tr. 41) and it was admitted in evidence, with permission to withdraw on substitution. Our contention is that even IF the decedent had executed such a form for change of beneficiary, witnessed as required, and had forwarded it, immediately or otherwise, unaccompanied by the policy, it would have been of none effect.

This Court would seem to have overlooked the point, previously argued by us, that the trial court in its Conclusion of Law No. 1 (Tr. 22) must have reasoned that by filing this confidential statement the decedent Wallace Phillip Gulley took affirmative action evidencing an exercise of his right to change beneficiary, and, inferentially, that the confidential statement was in itself such change. Counsel concurred in this in their brief and (page 6) went even beyond it in contending that oral statements alleged to have been made to the wife and to Baker established the affirmative acts required to effectuate the intent. On the oral argument counsel (Mr. Smith) was asked by a member of this Court if it were his contention that the filing of the confidential statement was in itself a change of beneficiary, and answered—albeit somewhat hesitantly—that it was. So far this Court has never so held, nor, as we have found, has any other of appellate jurisdiction.

In view of the fact that the trial judge based his decision on the confidential statement, seemingly disregarding the other evidence as evenly balanced—as Judge Chambers says, he believed everybody—may we invite attention to the fact that there was no reference to a confidential statement or report in the Aguilar case? Counsel in their brief contended that such confidential statements were "required by Government." True, the decedents in the two cases were in different branches of the service, but so were those in the Bradley and Kendig cases. In our view all that

the reported cases show is that confidential statements or reports of one kind or another are or were required of flying officers. For enlisted non-flying personnel they may well be and we believe are entirely voluntary. Should this case ever be remanded for a new trial we are in a position to offer evidence on that point.

V

The trial court and this Court seemingly gave undue weight to the testimony of Neil D. Baker, a deposition on written interrogatories, with no one present representing the plaintiff. The Court adopts the finding below that statements or a statement were made by the decedent to Baker in June, 1947, and by way of comment thereon, says that these or this were made "subsequent to the statement made to the sister, . . . being then removed from the family influence", etc. Would it not have been equally reasonable to have concluded that Baker's statement or statements might have been a fabrication? He may have been a disinterested witness, but on the other hand, he was acquainted with the defendant Mary Jane Gulley since toward the end of 1946, which would be shortly after her marriage to the decedent, had been named by her as the escort for the body of her late husband to Nevada, and had left Ely on the same bus with her the night after the funeral for the return to Southern California. It may be assumed that he told her, on that trip or later, (although he said in the deposition he had not seen her since) that he would do what he could to help her get the insurance,

but, curiously enough, nothing about the confidential statement. He was interviewed by counsel in June, 1948, and made an affidavit which was used on the hearing before the Veterans Administration at Sawtelle. After the one interview and possibly others, interrogatories were prepared for the deposition taking. The deposition shows that Baker seldom gave dates when asked for them. He volunteered (Int. 8) that a conversation took place in June, '47, fixing the time by reference to a furlough, and went on to say what the conversation was, although not then asked. This came up under Nos. 12 and 13, and he then told where but not when. Passing the questions about confidential statements, in which he was fed a date by No. 19, as it happens, the date on the confidential statement, we have insurance as a topic again, whether the same or another conversation, as he did not answer the question of when it was. A willing but not a definite witness, we should say.

The rule that the trial court has the opportunity of observing the demeanor of the witness, etc. does not apply here, as Baker was not before the court and there was nothing to judge him except cold typewriting, as there is nothing before this Court except cold print. The defendant Mrs. Wauson was present when the deposition was read, and thereafter testified personally. She fixed the date of a second conversation with her husband on the topic of insurance, rather indefinitely, as about two months prior to his death, which might mean in June, 1947. Both she and her counsel knew at all times after the hearing at Sawtelle that her ex-mother-in-law would rely upon

statements made by her son in the previous month, around Mother's Day of 1947. There was every opportunity for agreement upon a date subsequent thereto for testimony as to other statements diametrically opposed thereto.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the District Court of the United States for the District of Nevada be, upon further consideration, reversed and the cause either remanded for new trial, with appellant's costs herein, or judgment thereon rendered by this Court.

Respectfully submitted,

ROBERT RICHARD GILL
Ely, Nevada
Attorney for Petitioner and Plaintiff-Appellant

I, Robert Richard Gill, attorney for appellant, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for the purpose of delay.

Robert Richard Gill

No. 14330

United States Court of Appeals

for the Ninth Circuit

ACE TRACTOR AND EQUIPMENT COMPANY, INC.,

Appellant,

vs.

OLYMPIC STEAMSHIP COMPANY, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-23-54

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United States
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

INDEX PAGE

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In the United States District Court, Southern District of California, Central Division

No. 12633-M

OLYMPIC STEAMSHIP CO., INC., a Corporation,

Libelant,

vs.

ACE TRACTOR & EQUIPMENT CO., INC., a Corporation,

Respondent.

LIBEL IN PERSONAM FOR INDEMNITY AND/OR CONTRIBUTION

Libelant, Olympic Steamship Co., Inc., a corporation, files herein its libel in personam for indemnity and/or contribution against the respondent, Ace Tractor & Equipment Co., Inc., a corporation, and alleges as follows:

First: At all times herein mentioned libelant was and it now is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in the Western District of Washington, Northern Division.

Second: At all times herein mentioned the respondent was and it now is a corporation organized and existing under and by virtue of the laws of the State of California with its principal place of

business in the Southern District of California, Central Division. [2*]

Third: At all times herein mentioned libelant was the bare-boat Charterer of the SS "Edward A. Filene," a merchant vessel of the United States, and at all times herein mentioned one Calvin H. Sides was employed by libelant on said vessel as radio operator and seaman for a voyage commencing on or about the 1st day of June, 1948, at San Francisco, California, to Alaskan waters and return.

Fourth: That on or about May 28, 1948, libelant, as bare-boat Charterer and respondent as Voyage Charterer entered into a Voyage Charter Party wherein and whereby the said respondent chartered said vessel the SS "Edward A. Filene" for a voyage commencing on or about the 1st day of June, 1948, from San Francisco, California, to Alaskan waters and return. That said Voyage Charter Party provides, in part, as follows:

"The Charterer agrees to pay for all stevedore damage and to indemify the Vessel and the Owner for any damage or expense caused by the act or neglect of the Charterer or its Agents or contractor appointed by the Charterer or performing any of its duties in the loading or discharging of the Vessel or from failure of equipment supplied by them."

Fifth: That on or about the 19th day of June, 1948, at about the hour of 2:30 p.m. on said day, said vessel was in navigable waters at Amchitka,

*Page numbering appearing at foot of page of original Certified Transcript of Record.

Aleutian Islands, and respondent was in charge and control of the loading of cargo in the lower No. 4 hold of said vessel. On said date and at said time and place the respondent was the owner of a certain wire or steel cable which respondent had installed in the hold of said vessel to which cable respondent connected the loading gear of said vessel. That said wire cable was defective and insufficient for the purpose for which it was being used.

Sixth: That at all times herein mentioned the winch driver who was operating the loading gear attached to said wire cable in the lower No. 4 hold of said vessel was an employee of [3] respondent and was acting in the course and scope of his employment as such winch driver. That while the said Calvin H. Sides was working in the course of his employment in the lower No. 4 hold of said vessel the said winch driver carelessly and negligently operated said loading gear as to place an excessive strain on said wire cable. That as the sole proximate result either of the defective condition of said wire cable or the negligence and carlessness of said winch driver, aforesaid, said wire cable parted, causing a sling load of steel mats, weighing in excess of 2000 pounds to swing and strike the said Calvin H. Sides with great force and violence and leaving him pinned under said sling load, and libelant is informed and believes and therefore alleges that the said Calvin H. Sides sustained severe injury to the muscles and bones of his back, severe shock, a comminuted fracture of his left tibia, with severe displacement of fragments; that he developed an in-

fection of his left fibula, left tibia and bones of his ankle and foot, resulting in a circulatory disorder in his left leg and thigh which necessitated the performance of a sympathectomy operation; that since said injuries, sustained as aforesaid, the said Calvin H. Sides has been totally incapacitated from following any gainful occupation; that his back and his left leg have been permanently injured and weakened; that the full extent of his said injuries and disability is still unknown to him; that his ability to follow any gainful occupation has been permanently impaired and that he has suffered extreme pain in the past, now suffers, and will suffer such pain in the future.

Seventh: That on or about the 18th day of January, 1949, the said Calvin H. Sides filed an action at law in the United States District Court, Western District of Washington, Northern Division, against libelant herein, the said Olympic Steamship Co., Inc., a corporation, alleging in said action that he, the said Calvin H. Sides, was an employee of said Olympic Steamship Co., Inc., a [4] corporation, on June 19th, 1948; that on said date when said vessel was at Amchitka, Aleutian Islands, loading cargo, the said Calvin H. Sides was then in the course of his employment in the lower No. 4 hold of said vessel, SS "Edward A. Filene"; that at said time and place said vessel was unseaworthy in that the wire cable installed in said hold, to which the loading gear of said vessel was connected, was defective and unable to support the weights for which it was

intended; that the winch driver, in the course of his employment, carelessly and negligently operated said loading gear as to place an excessive strain on said wire cable; that as a direct and proximate result of the unseaworthiness of the vessel and the negligence of the said Olympic Steamship Co., Inc., a corporation, as aforesaid, said wire cable parted, causing a sling load of steel mats, weighing in excess of 2,000 pounds, to swing and strike the said Calvin H. Sides with great force and violence and leaving him pinned under said sling load and as a direct and proximate result of the unseaworthiness of the said vessel and the negligence of the Olympic Steamship Co., Inc., a corporation, as aforesaid, said Calvin H. Sides sustained severe and permanent injuries as hereinabove, in Article Sixth, more particularly set forth; that said Calvin H. Sides further alleged that at the time of receiving said injuries he was an able bodied man of the age of 39 years with a normal life expectancy of 28.90 years, capable of earning and actually earning the sum of $500.00 a month as a radio operator and seaman; that ever since said 19th day of June, 1948, said Calvin H. Sides has been and now is and for a long period of time in the future will be totally incapacitated from following any gainful occupation; that his back and his left leg have been permanently injured and weakened; that the full extent of his injuries and disability is still unknown to him; that his ability to follow any gainful occupation has been permanently impaired; that he has suffered extreme pain [5] in the past, now suffers and will suffer such

pain in the future, to his total damage in the total sum of $50,000.00.

Eighth: Libelant, Olympic Steamship Co., Inc., a corporation, alleges that it did not inspect said wire cable or ascertain that the same was in a defective condition at any time prior to the time said wire cable was put to use on said vessel by respondent herein, or at any time or at all up to and including the time when said wire cable parted and said Calvin H. Sides sustained injury as hereinabove alleged.

Ninth: On January 4, 1950, respondent herein, by and through Raymond G. Stanbury, Esq., who at said time was acting as the agent of respondent and in the course of his authority as such, agreed that the case of Calvin H. Sides v. Olympic Steamship Co., Inc., then pending in the United States District Court, Western District of Washington, Northern Division, could be settled by libelant, without prejudice to the respondent, Ace Tractor and Equipment Co., Inc., a corporation, by the payment by libelant herein to the said Calvin H. Sides of the sum of $14,000.00 and respondent agreed that said sum of $14,000.00 was a fair and reasonable sum to be paid to said Calvin H. Sides, and respondent also insisted that libelant obtain from said Calvin H. Sides a dismissal with prejudice of the action for damages filed by the said Calvin H. Sides in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Calvin H. Sides, Plaintiff, v. Ace Tractor and Equipment Co.,

Inc., a corporation, numbered amongst the files of said Court, 558-573.

Tenth: Thereafter, and on the 16th day of January, 1950, with the written consent and approval of respondent, as aforesaid, libelant settled and compromised the claim of said Calvin H. Sides against libelant, for the sum of $14,000.00, and upon receipt of said sum of $14,000.00, the said Calvin H. Sides executed and delivered to libelant a receipt and release, by the terms of which [6] said Calvin H. Sides did release, discharge and forever acquit the SS "Edward A. Filene," her agents, owners, officers and crew and charterers, Olympic Steamship Co., Inc., a corporation, and/or any and all other persons, firms or corporations having any interest in or connection with said SS "Edward A. Filene," of and from any and all claims, demands or charges of whatsoever nature, and from any and all damages, injuries, actions or causes of action either at law, in equity or admiralty, for negligence or otherwise, including claim for wages, maintenance and/or cure, arising out of or in connection with the accident sustained by said Calvin H. Sides on or about the 19th day of June, 1948, while he was employed as radio operator aboard said vessel, which said accident and injuries resulting therefrom were the subject matter of the action commenced by said Calvin H. Sides against libelant herein in said United States District Court, Western District of Washington, Northern Division, and for and in further consideration of the payment by

libelant to said Calvin H. Sides of said sum of $14,000.00, the said Calvin H. Sides did also release, discharge and forever acquit the respondent herein, Ace Tractor and Equipment Co., Inc., a corporation, its agents and owners and/or any and all other persons, firms or corporations having any interest in or connection with said Ace Tractor and Equipment Co., Inc., a corporation, of and from any and all claims, demands or charges of whatsoever nature and from any and all injuries, actions or causes of action, either at law, in equity or admiralty, for negligence or otherwise, including claim for wages, maintenance and/or cure arising out of or in connection with said accident hereinabove described, resulting in the injuries to said Calvin H. Sides as hereinbefore described, and said Calvin H. Sides authorized his attorneys to dismiss with prejudice and without costs that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Calvin H. Sides, Plaintiff, vs. Ace Tractor [7] and Equipment Co., Inc., a Corporation, Defendant, No. 558,573, the basis of said action being the negligence of the Ace Tractor and Equipment Co., Inc., a corporation, which caused the accident and injuries as described hereinabove; that the dismissal with prejudice of said action was entered in the records of said Superior Court on February 3, 1950.

Eleventh: That on March 29, 1949, libelant tendered to respondent herein, the defense of said action filed by the said Calvin H. Sides in said

United States District Court, Western District of Washington, Northern Division, against libelant and said respondent refused to accept the defense of said action on behalf of libelant.

Twelfth: That by reason of the relationship existing between libelant and the said Calvin H. Sides, libelant owed to said Calvin H. Sides the duty to provide him with a seaworthy vessel and appliances and a reasonably safe place to work and as a result of the breach of said duty in failing to inspect the said equipment owned by respondent and brought aboard said vessel by respondent, libelant was guilty of passive negligence and by reason thereof is entitled to recover from respondent all sums incurred and paid by libelant in the defense and settlement of said action, as aforesaid, together with interest thereon at the rate of 7% per annum from the date of payment of each said sum.

Thirteenth: That libelant has paid in the defense and settlement of said action, aforesaid, the following sums, on the dates set opposite each item, as follows, to wit:

Item	Amount	Date
Bogle, Bogle & Gates—investigation expense	$ 2.25	9-17-48
Calvin H. Sides—on account of any amounts found to be due	750.00	11- 2-48
Calvin H. Sides—on account of any amounts found to be due	500.00	12-10-48
Bogle, Bogle & Gates—investigation expense	7.50	1-12-49
Seattle Artificial Limb Co.—short leg brace with molded tibial furnished Sides	45.32	1-13-49

Item	Amount	Date
Bogle, Bogle & Gates—to reimburse:		
H. W. Boylan, Court Reporter—Deposition of James E. Fink	$ 43.20	4- 5-49
Witness fee	15.00	4- 5-49
Investigation expense	5.85	4- 5-49
Gray & Lister—witness expense:		
Gene Sutherland—for deposition	20.00	5-24-49
Gray & Lister—witness expense:		
Gene Sutherland—for deposition	10.00	5- 4-49
John S. Beckwith—Official Reporter:		
Deposition of Gene Sutherland	51.70	6- 7-49
Bogle, Bogle & Gates—investigation expense	1.86	8- 1-49
Bogle, Bogle & Gates—deposition of:		
Clifford O. Bergstrom	29.90	12- 7-49
Fowler, White, Gillen, Yancey & Humkey—legal services and disbursements	22.42	12-15-49
James L. Simonton, Attorney, Cody, Wyoming—legal services	5.00	1- 3-50
Calvin H. Sides and Levinson & Friedman, his attorneys—settlement	14,000.00	1- 6-50
Gene Sutherland—witness expense	35.00	1- 5-50
Bogle, Bogle & Gates—reimbursement:		
Drs. Jones and Buckner	25.00	1-18-50
Deposition of Calvin Sides	54.05	1-18-50
Paid Levinson & Friedman—expense of bringing Sides to Seattle for deposition	140.44	1-18-50
Bogle, Bogle & Gates—reimbursement:		
Nickum & Sons—services in preparing drawing #4 Hold	45.20	2- 2-50
Investigation expense	32.80	2- 2-50
Thomas H. Walsh, Attorney, Boston, Mass.—services and disbursements	55.31	3-25-50
Bogle, Bogle & Gates—investigation expense	18.77	6- 1-50
Bogle, Bogle & Gates—services rendered	1,000.00	6- 7-50
William B. De Mond, 1st. Lt., MC—medical services and X-rays	50.00	7-16-48
Farwest Ambulance Service, Seattle—ambulance from airport to Marine Hospital	22.00	7-16-48

Item	Amount	Date
Northwest Airlines, Inc. — transportation Calvin H. Sides, Anchorage, Alaska, to Seattle, Washington	$ 138.00	9- 2-48
Calvin H. Sides—subsistence at Adak Hospital	12.69	9-15-48
Calvin H. Sides—attendance at Anchorage Hospital	10.00	9-15-48
Calvin H. Sides—unearned wages less taxes	154.81	9-16-48
Reeve Aleutian Airways — transportation Calvin H. Sides, Adak to Anchorage, Alaska	259.90	1-18-49
G. J. Reilly, ex-Master SS Edward A. Filene —expense in traveling to Portland and Seattle to testify	77.52	1-11-50

That the total of said items hereinabove set forth is the sum of $17,641.29. That the sums so paid are and each thereof is the reasonable value of the matters and things for which payment was made.

Fourteenth: Pursuant to Article 3, Section 2 of the Constitution of the United States, and Title 28, United States Code, Sec. 1333, this Honorable Court has original jurisdiction of the subject matter of the above action. [10]

Second Cause of Action

Fifteenth: Libelant incorporates herein by reference thereto its allegations and each thereof in Articles First to Eleventh, inclusive, and Articles Thirteenth and Fourteenth of its First Cause of Action and by such reference makes the same a part hereof.

Sixteenth: If by reason of the failure of libelant to inspect the said equipment owned by respondent

and brought aboard said vessel by respondent, at the time and place hereinabove alleged, libelant was guilty of active negligence the said libelant and the said respondent were joint tort feasors and libelant is entitled to contribution from said respondent.

Wherefore, libelant prays that a Citation in due form of law may issue against the respondent, citing it to appear and answer in the premises, and that this Honorable Court enter its decree in favor of libelant and against respondent on the first cause of action set forth herein declaring that libelant is entitled to recover from respondent the total sum of $17,641.29, together with interest at the rate of 7% per annum from the date of payment of each item set forth in Article Thirteenth; or that this Honorable Court enter its decree in favor of libelant and against respondent on the second cause of action set forth herein, declaring that libelant is entitled to recover from respondent a sum equal to the percentage of the whole damage to which negligence on the part of respondent contributed thereto; and that libelant recover from respondent its costs incurred and to be incurred herein; and for such other and further relief as to the Court may seem proper.

/s/ LASHER B. GALLAGHER,
Proctor for Libelant. [11]

State and Southern District of California,
County of Los Angeles—ss.

Lasher B. Gallagher, being first duly sworn, deposes on oath and says:

That he is an attorney at law and proctor in admiralty; that he is proctor for libelant, Olympic Steamship Co., Inc., a corporation, in the above-entitled action, and makes this verification on behalf of said corporation for the reason that there is no officer of said corporation who resides in the County of Los Angeles where deponent has his office and that deponent is more familiar with the matters set forth in the foregoing Libel than said libelant; that the source of deponent's knowledge are statements of witnesses, depositions, pleadings and other documentary evidence; that deponent has read the foregoing Libel and knows the contents thereof, and the same is true to the best of deponent's knowledge, information and belief.

/s/ LASHER B. GALLAGHER.

Subscribed and sworn to before me this 27th day of November, 1950.

[Seal] /s/ ENES SARVELLO,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed December 1, 1950. [12]

[Title of District Court and Cause.]

ANSWER OF RESPONDENT, ACE TRACTOR AND EQUIPMENT CO., INC.

Respondent, Ace Tractor and Equipment Co., Inc., a corporation, files herein its answer to the libel in the above-entitled action, and admits, denies and alleges, as follows:

I.

Answering the allegations of the First Article, alleges that it has no information or belief sufficient to enable it to answer the allegations of said article, and basing its denial on said ground, denies generally and specifically each and every one of said allegations.

II.

Admits the allegations of the Second Article. [13]

III.

Answering the allegations of the Third Article, admits that at the times therein mentioned libelant was the bareboat charterer of the S.S. Edward A. Filene.

Except as expressly admitted, alleges that it has no information or belief sufficient to enable it to answer the allegations of said article, and basing its denial on said ground, denies generally and specifically each and every one of said allegations.

IV.

Admits the allegations of the Fourth Article, and

alleges that Paragraph 2 (c) of Part II of the said Voyage Charter Party provides in full as follows:

"The Charterer agrees to provide and pay for workmen's compensation, job liability and other insurance required by law or custom upon stevedores or other workmen employed by or performing any of the duties of the Charterer hereunder at all ports or places of loading and discharging and will furnish the Owner upon demand a certificate of such insurance. The Charterer agrees to pay for all stevedore damage and to indemnify the Vessel and the Owner for any damage or expense caused by the act or neglect of the Charterer or its Agents or contractors appointed by the Charterer or performing any of its duties in the loading or discharging of the Vessel or from failure of equipment supplied by them."

V.

Answering the allegations of the Fifth Article, admits that [14] on or about the 19th day of June, 1948, at or about the hour of 2:30 p.m., the said vessel S.S. Edward A. Filene was anchored in navigable waters at Amchitka, Aleutian Islands, and that respondent was in charge and control of the loading of cargo in the lower No. 4 hold of the vessel.

Except as expressly admitted, denies generally and specifically each and every one of the allegations of said article.

VI.

Answering the allegations of the Sixth Article, admits that at the times therein mentioned the

winch driver, who was operating the loading gear in the lower No. 4 hold of said vessel, was an employee of respondent, and that one Calvin H. Sides was employed on said vessel, and in this connection alleges that by the terms of the Voyage Charter Party, referred to in the Fourth Article of the libel, respondent was obliged to and did use crew members, including the said Calvin H. Sides for the loading of said vessel, and that respondent was obliged to provide and pay for Workmen's Compensation insurance upon such persons while so employed.

Except as expressly admitted or alleged, alleges it has no information or belief sufficient to enable it to answer the remaining allegations of said article, and basing its denial on such ground, denies generally and specifically each and every one of said allegations.

VII.

Answering the allegations of the Seventh Article, alleges that it has no information or belief sufficient to enable it to answer the allegations of said article, and basing its denial on said ground, denies generally and specifically each and every one of said allegations.

VIII.

Answering the allegations of the Eighth [15] Article, alleges that it has no information or belief sufficient to enable it to answer the allegations of said article, and basing its denial on said ground, denies generally and specifically each and every one of said allegations.

IX.

Answering the allegations of the Ninth Article, admits that the respondent agreed that the case of Calvin H. Sides v. Olympic Steamship Co., Inc., could be settled by libelant upon substantially the terms as alleged in said article, but alleges that the exact terms of this agreement are set out in that letter from Raymond G. Stanbury to Mr. Murray H. Roberts, dated January 4, 1950, which is attached hereto and marked Exhibit "A," and is incorporated herein as though fully set forth at length.

Except as expressly admitted or otherwise alleged, denies generally and specifically each and every one of the allegations of said article.

X.

Answering the allegations of the Tenth Article, admits that the certain action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled "Calvin H. Sides, Plaintiff, vs. Ace Tractor and Equipment Co., Inc., a Corporation, Defendant," being numbered 558,573, was dismissed with prejudice on February 3, 1950.

Alleges that the respondent has no information or belief sufficient to enable it to answer the remaining allegations of said article, and basing its denial on said ground, denies generally and specifically each and every one of said allegations.

XI.

Admits the allegations of the Eleventh [16] Article.

XII.

Answering the allegations of the Twelfth Article, admits that libelant owed to said Calvin H. Sides a duty to provide him with a seaworthy vessel and appliances and a reasonably safe place to work.

Except as expressly admitted or alleged, denies generally and specifically each and every one of the allegations of said article.

XIII.

Answering the allegations of the Thirteenth Article, alleges that it has no information or belief sufficient to enable it to answer the allegations of said article, and basing its denial on said ground, denies generally and specifically each and every one of said allegations.

XIV.

Admits the allegations of the Fourteenth Article.

Answer to Second Cause of Action

XV.

Respondent incorporates herein by reference each of its admissions, denials and allegations in Articles First through Eleventh, inclusive, and Articles Thirteenth and Fourteenth of its answer to libelant's first cause of action, and by reference makes the same a part hereof.

XVI.

Denies the allegations of the Sixteenth Article, and in this connection alleges that at the time of

the accident herein involved, said Calvin H. Sides was working immediately under the direction and control of respondent, and that said [17] Calvin H. Sides was an employee of respondent, working as a longshoreman at the time of said injury, and was engaged in maritime employment on the navigable waters of the United States; that at all times herein mentioned respondent carried the proper insurance for its employees under the terms of the Longshoremen and Harbor Workers Compensation Act, and that libelant herein is barred from any recovery against respondent by the terms and effect of said Longshoremen and Harbor Workers Compensation Act.

As a Separate and Affirmative Defense to Both Causes of Action Alleged Therein, Respondent Alleges as Follows:

I.

At the time of the accident herein involved, said Calvin H. Sides was working immediately under the direction and control of respondent, and that said Calvin H. Sides was an employee of respondent, working as a longshoreman at the time of said injury, and was engaged in maritime employment on the navigable waters of the United States.

II.

That at all times herein mentioned respondent carried the proper insurance for its employees under the terms of the Longshoremen and Harbor Workers Compensation Act, and that libelant herein is barred from any recovery against respondent by

the terms and effect of said Longshoremen and Harbor Workers Compensation Act.

Wherefore, respondent prays that libelant take nothing [18] by its libel herein; that respondent go hence with its costs of suit incurred, and for such other and further relief as to the court may seem just and proper in the premises.

LILLICK, GEARY & McHOSE,

By /s/ GORDON K. WRIGHT,

Attorneys for Respondent, Ace Tractor and Equipment Co., Inc.

Duly verified. [19]

EXHIBIT A

January 4, 1950.

Mr. Murray H. Roberts,
Citizens Bank Building,
Wilmington, California.

Re: Sides v. Ace Tractor and Equipment Company.

Dear Mr. Roberts:

This is to advise you that we are the attorneys for the Ace Tractor and Equipment Company in the above matter and as such have authority to make the agreement stated below.

The Ace Tractor and Equipment Company hereby agrees that the pending action of Calvin H. Sides against the Olympic Steamship Company in the District Court of the United States in the Western District of Washington, Central Division, being number 2179, may be settled by Messrs. Bogle, Bogle & Gates, attorneys for the Olympic Steamship Company, without prejudice to the Ace Tractor and Equipment Company by the payment by the Olympic Steamship Company to Calvin H. Sides of the sum of $14,000.00, said sum being considered by us as a fair and reasonable sum without prejudice and that by so agreeing we are not admitting any liability on our part. This agreement is given in consideration of Messrs. Bogle, Bogle & Gates obtaining from Calvin H. Sides a dismissal with prejudice of his action now pending in the Los Angeles Superior Court, entitled Calvin H. Sides against Ace Tractor and Equipment Company, being number 558573.

Very truly yours,

PARKER, STANBURY,
REESE & McGEE,

By RAYMOND G. STANBURY.

RGS:HC
Special Delivery.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 7, 1951. [21]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having duly come on to be heard in its regular order before the Honorable Ernest A. Tolin, Judge presiding, upon the pleadings and proofs, and the Court after due deliberation having rendered its opinion directing a decree in favor of the libelant and against the respondent, the Court now makes the following:

Findings of Fact

I.

At all times mentioned in the libel the Ace Tractor and Equipment Co., Inc., was and it now is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the Southern District of California, Central Division. [23]

II.

At all times mentioned in the libel the Olympic Steamship Co., Inc., was and it now is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in the Western District of Washington, Northern Division.

III.

At all times mentioned in the libel the Olympic Steamship Co., Inc., was the Bare Boat Charterer of the SS "Edward A. Filene," a merchant vessel of the United States. Calvin H. Sides was employed by the Olympic Steamship Co., Inc., on said vessel

as radio operator and seaman for a voyage commencing on or about the 1st day of June, 1948, at San Francisco, California, to Alaskan waters and return and while taking part in the loading of cargo in the No. 4 hold of said vessel at Amchitka, Aleutian Islands, during the course of said voyage, said Calvin H. Sides sustained severe injury to the muscles and bones of his back, severe shock, a comminuted fracture of his left tibia, with severe displacement of fragments; he developed an infection of his left fibula, left tibia and bones of his ankle and foot, resulting in a circulatory disorder in his left leg and thigh which necessitated the performance of a sympathectomy operation; and said Calvin H. Sides suffered a permanent injury and weakness in his back and left leg. Prior to the commencement of said voyage the said Calvin H. Sides had signed Articles for the voyage and for his services aboard said vessel. Said Articles were signed by said Calvin H. Sides at San Francisco and the voyage for which he was employed was from San Francisco to Alaska and back to a west coast port. Said Calvin H. Sides did not at any time up to and including the happening of the accident as a result of which he was injured, hereinafter mentioned, sign off said Articles.

IV.

On or about May 28, 1948, Olympic Steamship Co., Inc., as [24] Bare Boat Charterer, and owner pro hac vice, and Ace Tractor and Equipment Co., Inc., as Voyage Charterer, entered into a Voyage Charter Party at San Francisco, California, wherein and whereby said Ace Tractor and Equip-

ment Co., Inc., space chartered said vessel, the SS "Edward A. Filene," for a voyage commencing on or about the 1st day of June, 1948, from San Francisco, California, to Alaskan waters and return. That said Voyage Charter Party provides, in part, as follows:

"The Charterer agrees to provide and pay for workmen's compensation, job liability and other insurance required by law or custom upon stevedores or other workmen employed by or performing any of the duties of the Charterer hereunder at all ports or places of loading and discharging and will furnish the Owner upon demand a certificate of such insurance. The Charterer agrees to pay for all stevedore damage and to indemnify the Vessel and the Owner for any damage or expense caused by the act or neglect of the Charterer or its Agents or contractor appointed by the Charterer or performing any of its duties in the loading or discharging of the Vessel or from failure of equipment supplied by them."

Said Charter Party also provided that loading, stowing, trimming, and discharging expenses were to be for Charterer's account; that overtime to vessel's crew in connection with loading and discharging of cargo was to be for Charterer's account; and that at loading port, Charterer was to use crew members for loading vessel and that payment was to be made by Charterer in accordance with Owner's Alaska labor agreements. [25]

V.

On or about the 19th day of June, 1948, at about the hour of 2:30 p.m. on said day, said vessel was in navigable waters at Amchitka, Aleutian Islands, and the Ace Tractor and Equipment Co., Inc., a corporation, was in charge and control of the loading of cargo in the lower No. 4 hold of said vessel. The equipment and appliances of the said vessel which were being used by the respondent at the time of the loading of cargo in said lower No. 4 hold of the vessel at and immediately preceding the accident hereinafter referred to consisted of a steam cog winch, booms, winch falls, also referred to as runners, and a snatch block. The respondent, at and immediately prior to the time of said accident, was the owner or in control of and selected for use a certain wire or steel cable, also referred to as a plow steel wire strap, which said respondent had supplied and brought aboard said vessel for the purpose of using it as a part of the equipment necessary to move a sling load of steel mats, weighing approximately 2,000 pounds, from the square of the No. 4 hatch into a wing of the No. 4 hold. The said plow steel wire strap had an eye on each end of it and it was reeved through a limber hole in the frame of the side of the vessel and the snatch block was attached to the said two eyes and the winch falls were reeved into said snatch block. The winch falls were attached to said sling load of steel mats and the power or force required to move said sling load of steel mats from the square of the No. 4 hatch into the wing of the No. 4 hold was furnished by the said steam cog winch and said steam cog winch

was at all times mentioned in this paragraph being operated and controlled by an employee of the respondent acting in the course and scope of his employment as a winch operator. One Gene Southerland was, at all times mentioned herein while the said vessel was being loaded at Amchitka, Aleutian Isuands, employed as walking boss by the respondent and was at all of said times acting in the course of [26] his employment and said Gene Southerland was in charge of all loading operations and had supervision over all of the workmen on the vessel. The winch operator, hereinabove referred to, was not a competent winch operator and the fact of his incompetency was known to the respondent by and through its servants and agent, Gene Southerland, prior to the happening of the accident hereinafter referred to and the said Gene Southerland negligently permitted the said winch operator to continue to operate and control said steam cog winch up to and including the time of said accident, and said negligence was one of the proximate causes of the injuries sustained by said Calvin H. Sides.

VI.

Said plow steel wire strap was not adequate for the purpose for which it was supplied and used by respondent at the time of said accident and as the proximate result of said inadequacy the said plow steel wire strap failed and parted when being used for the purpose of assisting in dragging or pulling a sling load of landing mats, weighing approximately 2,000 pounds, from the square of the No. 4 hatch into the wing of said No. 4 hold. Said plow steel

wire strap was 5/8 of an inch in diameter and such an appliance in good condition has a breaking point when subjected to a load of 14 or 15 tons and the safe working load thereof was approximately 3 tons. All of the appliances and equipment which were being used by the respondent, as aforesaid, were, at all times while being used, under the management and control of the respondent and the accident was such as in the ordinary course of things does not happen if those who have the management of such equipment and appliances exercise reasonable care.

VII.

That said vessel was, at and immediately prior to said accident, unseaworthy in each of the following respects, to wit: [27]

1. The said plow steel wire strap was unseaworthy.

2. The winch operator was incompetent.

3. The place where Calvin H. Sides was working was not a reasonably safe place to work in that the failure and parting of said plow steel wire strap would necessarily cause the sling load of steel mats to move toward and strike the said Calvin H. Sides.

Each of said conditions was proximately caused by the act or neglect of Ace Tractor and Equipment Co., Inc.

VIII.

While the said Calvin H. Sides was working in the course of his employment as a servant of libelant, Olympic Steamship Co., Inc., in the No. 4 hold of said vessel and while the said winch driver was

attempting to pull or drag a sling load of steel mats, weighing approximately 2,000 pounds, toward the side of said hold of said vessel, the said plow steel wire strap failed and parted and there was a failure of said equipment supplied by respondent and the parting and failure of said equipment supplied by respondent thereby caused and permitted the sling load of steel mats to swing and strike said Calvin H. Sides with great force and violence and left him pinned under said sling load and at said time and place the said Calvin H. Sides sustained the injuries as hereinabove set forth. At and about said time the said Calvin H. Sides was engaged in assisting in the loading of said cargo.

IX.

On or about the 18th day of January, 1949, the said Calvin H. Sides filed an action at law in the United States District Court, Western District of Washington, Northern Division, against the Olympic Steamship Co., Inc., alleging in said action that he, the said Calvin H. Sides, was an employee of said Olympic Steamship Co., Inc., on June 19th, 1948; that on said date when said vessel [28] SS "Edward A. Filene" was at Amchitka, Aleutian Islands, loading cargo, the said Calvin H. Sides was then in the course of his employment in the lower No. 4 hold of said vessel; that at said time and place said vessel was unseaworthy in that the wire cable installed in said hold to which the loading gear of said vessel was connected was defective and unable to support the weights for which it was intended; that the winch driver in the course of his

employment carelessly and negligently operated said loading gear as to place an excessive strain on said wire cable; that as a direct and proximate result of the unseaworthiness of the vessel and the negligence of the said Olympic Steamship Co., Inc., as aforesaid, said wire cable parted, causing a sling load of steel mats, weighing in excess of 2,000 pounds to swing and strike the said Calvin H. Sides with great force and violence and leaving him pinned under said sling load and as a direct and proximate result of the unseaworthiness of the said vessel and the negligence of the Olympic Steamship Co., Inc., as aforesaid, said Calvin H. Sides sustained severe and permanent injuries, as hereinabove set forth; that said Calvin H. Sides further alleged that at the time of receiving said injuries he was an able bodied man of the age of 39 years with a normal life expectancy of 28.90 years, capable of earning and actually earning the sum of $500.00 a month as a radio operator and seaman; that ever since said 19th day of June, 1948, said Calvin H. Sides has been and now is and for a long period of time in the future will be totally incapacitated from following any gainful occupation; that his back and his left leg have been permanently injured and weakened; that the full extent of his injuries and disability is still unknown to him; that his ability to follow any gainful occupation has been permanently impaired; that he has suffered extreme pain in the past, now suffers and will suffer such pain in the future, to his total damage in the total sum of $50,000.00. [29]

X.

It is true that at said time and place the said plow steel wire strap was an unseaworthy appliance in that it was defective and unable to support the weight for which it was intended and which it could have handled if it had been in good condition and a proximate cause of the injuries suffered by said Calvin H. Sides was the failure of said equipment so as aforesaid supplied by the respondent and the negligence of said respondent, Ace Tractor and Equipment Co., Inc., as aforesaid.

XI.

On January 4, 1950, Ace Tractor and Equipment Co., Inc., by and through Raymond G. Stanbury, Esq., who at said time was acting as the agent of said Ace Tractor and Equipment Co., Inc., and in the course of his authority as such, agreed that the case of Calvin H. Sides vs. Olympic Steamship Co., Inc., then pending in the United States District Court, Western District of Washington, Northern Division, could be settled by Olympic Steamship Co., Inc., without prejudice to Ace Tractor and Equipment Co., Inc., by the payment by said Olympic Steamship Co., Inc., to said Calvin H. Sides of the sum of $14,000, and Ace Tractor and Equipment Co., Inc., agreed that said sum of $14,000.00 was a fair and reasonable sum to be paid to said Calvin H. Sides, and said agreement was made by Ace Tractor and Equipment Co., Inc., in consideration of Messrs. Bogle, Bogle & Gates, attorneys of record for

Olympic Steamship Co., Inc., in said action then pending in the United States District Court, Western District of Washington, Northern Division, hereinabove referred to, obtaining from said Calvin H. Sides a dismissal with prejudice of his action then pending in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Calvin H. Sides, plaintiff, vs. Ace Tractor and Equipment Co., Inc., a corporation, being number 558,573 amongst the files [30] of said Superior Court of the State of California, in and for the County of Los Angeles.

XII.

On the 16th day of January, 1950, with the written consent and approval of Ace Tractor and Equipment Co., Inc., as aforesaid, Olympic Steamship Co., Inc., settled and compromised the claim of said Calvin H. Sides against said Olympic Steamship Co., Inc., for the sum of $14,000.00, and upon receipt of said sum of $14,000.00, said Calvin H. Sides executed and delivered to Olympic Steamship Co., Inc., a receipt and release, by the terms of which said Calvin H. Sides did release, discharge and forever acquit the SS "Edward A. Filene," her agents, owners, officers and crew and charterers, Olympic Steamship Co., Inc., a corporation, and/or any and all other persons, firms or corporations having any interest in or connection with said SS "Edward A. Filene," of and from any and all claims, demands or charges of whatsoever nature, and from any and all damages, injuries, actions or causes of action either at law, in equity or admiralty, for

negligence or otherwise, including claim for wages, maintenance and/or cure, arising out of or in connection with the accident sustained by said Calvin H. Sides on or about the 19th day of June, 1948, while he was employed as radio operator aboard said vessel, which said accident and injuries resulting therefrom were the subject matter of the action commenced by said Calvin H. Sides against Olympic Steamship Co., Inc., in said United States District Court, Western District of Washington, Northern Division, and for and in further consideration of the payment by Olympic Steamship Co., Inc., to said Calvin H. Sides of said sum of $14,00.00, the said Calvin H. Sides did also release, discharge and forever acquit the Ace Tractor and Equipment Co., Inc., its agents and owners and/or any and all other persons, firms or corporations having any interest in or connection with said Ace Tractor and Equipment Co., Inc., a corporation, of and from any and [31] all claims, demands or charges of whatsoever nature and from any and all injuries, actions or causes of action, either at law, in equity or admiralty, for negligence or otherwise, including claim for wages, maintenance and/or cure arising out of or in connection with said accident hereinabove described, resulting in the injuries to said Calvin H. Sides, and said Calvin H. Sides authorized his attorneys to dismiss with prejudice and without costs that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Calvin H. Sides, Plaintiff, vs. Ace Tractor and Equipment Co., Inc., a corporation, Defendant, No. 558,573, the basis of

said action being the negligence of the Ace Tractor and Equipment Co., Inc., a corporation, which caused the accident and injuries, as described hereinabove; that the said dismissal with prejudice of the said action was entered in the records of said Superior Court on February 3, 1950.

XIII.

On March 29, 1949, Olympic Steamship Co., Inc., tendered to Ace Tractor and Equipment Co., Inc., the defense of said action filed by the said Calvin H. Sides in said United States District Court, Western District of Washington, Northern Division, against said Olympic Steamship Co., Inc., and said Ace Tractor and Equipment Co., Inc., a corporation, refused to accept the defense of said action on behalf of said Olympic Steamship Co., Inc., a corporation.

XIV.

By reason of the relationship existing between Olympic Steamship Co., Inc., and said Calvin H. Sides, said Olympic Steamship Co., Inc., owed to said Calvin H. Sides the duty to provide him with a seaworthy vessel and appliances and a reasonably safe place to work. The said plow steel wire strap was an appliance which was ordinarily required as a part of the appliances of the [32] SS "Edward A. Filene" and in bringing the same aboard and in using it as a part of the loading gear, Ace Tractor and Equipment Co., Inc., impliedly agreed to supply and keep the same in proper order to the end that the Olympic Steamship Co., Inc., would not have a

legal liability imposed upon it upon the ground of a failure on its part to supply and keep in order the proper appliances appurtenant to the ship. The said Ace Tractor and Equipment Co., Inc., breached this contractual duty by supplying a plow steel wire strap which was unseaworthy and there was a failure of said equipment supplied by Ace Tractor and Equipment Co., Inc. Said failure of said equipment supplied by Ace Tractor and Equipment Co., Inc., was one of the proximate causes of the damage and expense imposed upon Olympic Steamship Co., Inc., as a proximate result of the settlement made with Calvin H. Sides and the necessary expenses incurred in connection with the suit filed by the said Calvin H. Sides against Olympic Steamship Co., Inc.

The Olympic Steamship Co., Inc., was not guilty of any active fault or active negligence in connection with the injuries and damage sustained by the said Calvin H. Sides.

XV.

The parties have stipulated that if the libelant is entitled to recover indemnity from the respondent the amount thereof is the sum of $16,250.85, which sum is the total of the following items set forth in Article Thirteenth of the libel, to wit:

Item	Amount	Date
Bogle, Bogle & Gates—investigation expense	$ 2.25	9-17-48
Bogle, Bogle & Gates—investigation expense	7.50	1-12-49
Seattle Artificial Limb Co.—short leg brace with molded tibial furnished Sides	45.32	1-13-49

Item	Amount	Date
Bogle, Bogle & Gates—to reimburse: H. W. Boylan, Court Reporter—deposition of James E. Fink	$ 43.20	4- 5-49
Bogle, Bogle & Gates—to reimburse for:		
Witness fee	15.00	4- 5-49
Investigation expense	5.85	4- 5-49
Gray & Lister—witness expense:		
Gene Southerland—for deposition	20.00	5-24-49
Gray & Lister—witness expense:		
Gene Southerland—for deposition	10.00	5- 4-49
John S. Beckwith—Official Reporter:		
Deposition of Gene Southerland	51.70	6- 7-49
Bogle, Bogle & Gates—investigation expense	1.86	8- 1-49
Bogle, Bogle & Gates—deposition of:		
Clifford O. Bergstrom	29.90	12- 7-49
Fowler, White, Gillen, Yancy & Humkey—legal services and disbursements	22.42	12-15-49
James L. Simonton, Esq., Cody, Wyoming—legal services	5.00	1- 3-50
Calvin H. Sides and Levinson & Friedman, his attorneys—settlement	14,000.00	1- 6-50
Gene Southerland—witness expense	35.00	1- 5-50
Bogle, Bogle & Gates—reimbursement:		
Drs. Jones and Buckner	25.00	1-18-50
Deposition of Calvin Sides	54.05	1-18-50
Bogle, Bogle & Gates—reimbursement:		
Nickum & Sons—services in preparing drawing of #4 Hold	45.20	2- 2-50
Investigation expense	32.80	2- 2-50
Thomas H. Walsh, Attorney, Boston, Mass.—services and disbursements	55.31	3-25-50
Bogle, Bogle & Gates—investigation expense	18.77	6- 1-50
Bogle, Bogle & Gates—services rendered	1,000.00	6- 7-50
William B. De Mond, 1st Lt., MC—medical services and X-rays	50.00	7-16-48
Farwest Amb. Ser., Seattle—ambulance from airport to Marine Hospital	22.00	7-16-48
Northwest Airlines—transportation Calvin H. Sides, Anchorage, Alaska, to Seattle, Wash.	138.00	9- 2-48

Item	Amount	Date
Calvin H. Sides—subsistence at Adak Hospital	$ 12.69	9-15-48
Attendance at Anchorage Hospital	10.00	9-15-48
Calvin H. Sides—unearned wages, less taxes	154.81	9-16-48
Reeve Aleutian Airways — transportation Calvin H. Sides, Adak to Anchorage, Alaska	259.90	1-18-49
G. J. Reilly, ex-Master SS Edward A. Filene —traveling expense. Portland and Seattle, for purpose of testifying at trial	77.51	1-11-50

XVI.

This Court has jurisdiction of the parties and the subject matter of the action.

Conclusions of Law

I.

The libelant is entitled to recover from the respondent as indemnity the sum of $16,250.85, together with interest thereon from the date of the payment of the last item included within said total, to wit, June 7, 1950, at the rate of 7% per annum, to the date of entry of the Final Decree herein.

II.

The libelant is entitled to recover from the respondent its costs of suit incurred herein.

Dated: February 18th, 1954.

/s/ ERNEST A. TOLIN,
United States District [35]
Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed February 18, 1954. [36]

In the United States District Court, Southern District of California, Central Division

No. 12633-T

OLYMPIC STEAMSHIP CO., INC., a Corporation,

Libelant,

vs.

ACE TRACTOR AND EQUIPMENT CO., INC., a Corporation,

Respondent.

FINAL DECREE

This cause having duly come on to be heard in its regular order before the Honorable Ernest A. Tolin, Judge Presiding, upon the pleadings and proofs, and the Court after due deliberation having rendered its opinion directing a decree in favor of the libelant and against the respondent, and written Findings of Fact and Conclusions of Law having been duly made in accordance therewith,

Now on motion of Lasher B. Gallagher, Proctor for Libelant;

It Is Hereby Ordered, Adjudged and Decreed, that Libelant, Olympic Steamship Co., Inc., a corporation, recover from the Respondent, Ace Tractor and Equipment Co., Inc., a corporation, the sum of Sixteen Thousand Two Hundred Fifty and 85/100 Dollars ($16,250.85), together with interest thereon

from June 7, 1950, at the rate of 7% per annum, to the date of entry of this Decree. [38]

It Is Further Ordered, Adjudged, and Decreed, that Libelant, Olympic Steamship Co., Inc., a corporation, recover from Respondent, Ace Tractor and Equipment Co., Inc., a corporation, its costs, taxed in the sum of $120.99.

Dated: February 18th, 1954.

/s/ ERNEST A. TOLIN,
United States District Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed February 18, 1954.

Docketed and entered February 18, 1954. [39]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To: The Honorable Ernest A. Tolin, Judge of the United States District Court, Southern District of California, Central Division:

Petitioner, Ace Tractor and Equipment Co., Inc., a corporation, Respondent in the above-entitled action, prays that it may be permitted to take an appeal from the Final Decree in favor of Libelant entered in this case on the 18th day of February, 1954, to the United States Court of Appeals for [41] the Ninth Circuit, for the reasons specified in the Assignments of Error which is filed herewith.

Dated this 26th day of March, 1954.

LILLICK, GEARY & McHOSE,

GORDON K. WRIGHT,

By /s/ GORDON K. WRIGHT,

Proctors for Respondent.

[Endorsed]: Filed March 26, 1954. [42]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Upon reading the Petition for Appeal of Ace Tractor and Equipment Co., Inc., a corporation, Respondent herein, for an appeal from the Final Decree in favor of Libelant, entered in this case on the 18th day of February, 1954, and from the whole thereof, and on consideration of the Assignments of Error filed herewith, and good cause appearing therefore:

It Is Ordered that the appeal herein be allowed as prayed for, and

It Is Further Ordered that all further proceedings in this Court be, and they are hereby stayed pending final disposition of the appeal herein allowed, and [43]

It Is Further Ordered that a transcript of the record, testimony, exhibits and all proceedings

herein be forthwith sent to the United States Court of Appeals for the Ninth Circuit.

Dated this 26th day of March, 1954.

/s/ ERNEST A. TOLIN,
United States District Judge.

[Endorsed]: Filed March 26, 1954. [44]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

1. The Court erred in finding that Respondent Ace Tractor & Equipment Company, Inc., at and immediately prior to the time of the accident to Calvin H. Sides, was the owner or in control of and selected for use a certain wire or steel cable, also referred to as a plow steel wire strap.

2. The Court erred in finding that Respondent, Ace Tractor & Equipment Company, Inc., had supplied and brought aboard the SS "Edward A. Filene" a certain wire or steel cable, also referred to as a plow steel wire strap.

3. The Court erred in finding that the certain wire or steel cable, also referred to as a plow steel wire strap, was, at or immediately prior to the accident to Calvin H. Sides, reeved [45] through a limber hole in the side of the vessel.

4. The Court erred in finding that at or immediately prior to the accident to Calvin H. Sides, a

snatch block was attached to the two eyes of that certain wire or steel cable, also referred to as a plow steel wire strap.

5. The Court erred in finding that the winch falls of the SS "Edward A. Filene" were attached to a certain sling load of steel mats at or immediately before said accident.

6. The Court erred in finding that Gene Southerland was in charge of all loading operations and had supervision over all of the workmen on the said SS "Edward A. Filene."

7. The Court erred in finding that the winch operator of the SS "Edward A. Filene" was not a competent winch driver.

8. The Court erred in finding that the said winch operator was known to be incompetent to Respondent.

9. The Court erred in finding that Gene Southerland negligently permitted said winch operator to continue to operate and control said steam cog winch up to and including the time of the accident to Calvin H. Sides, and that said negligence was one of the proximate causes of the injury sustained by Calvin H. Sides.

10. The Court erred in finding that the certain wire or steel cable, also referred to as a plow wire strap, was not adequate for the purpose for which it was supplied and used at the time of the accident to Calvin H. Sides.

11. The Court erred in finding that the inadequacy of that certain wire or steel cable, also referred to as a plow steel wire strap, was a proximate cause of its failure and parting.

12. The Court erred in finding that the said certain wire or steel cable, also referred to as a plow steel wire strap, [46] failed and parted when being used for the purpose of assisting in dragging and pulling a sling load of landing mats.

13. The Court erred in finding that all of the appliances and equipment being used at the time of the accident to Calvin H. Sides were under the management and control of Respondent.

14. The Court erred in finding that the accident to Calvin H. Sides was such that in the ordinary course of things does not happen if those who have the management and equipment of said appliances and equipment use reasonable care.

15. The Court erred in finding that the said SS "Edward A. Filene" was unseaworthy at the time and immediately prior to the accident to Calvin H. Sides.

16. The Court erred in finding that the place where Calvin H. Sides was working at the time of his accident was not a reasonably safe place to work.

17. The Court erred in finding that the failure of that certain wire or steel cable, also referred to as a plow steel wire strap, caused and permitted

the sling load of landing mats to swing and strike said Calvin H. Sides with great force and violence.

18. The Court erred in finding that Respondent brought that certain wire or steel cable, also referred to as a plow steel wire strap, aboard the SS "Edward A. Filene."

19. The Court erred in finding that Respondent impliedly agreed with Libelant to supply and keep in order any equipment used aboard the said SS "Edward A. Filene."

20. The Court erred in finding that Libelant Olympic Steamship Co., Inc., was not guilty of any active fault or active negligence in connection with the injuries or damage sustained [47] by the said Calvin H. Sides.

21. The Court erred in failing to find that the receipt and release executed by Calvin H. Sides on or about the 16th day of January, 1950, did not constitute a complete defense to the prosecution of the within libel by Libelant Olympic Steamship Co., Inc., against Respondent Ace Tractor and Equipment Co., Inc.

22. The Court erred in finding that there was any legal liability imposed upon Libelant Olympic Steamship Co., Inc., as a result of the injury to Calvin H. Sides.

23. The Court erred in finding that Libelant was entitled to recover indemnity from Respondent in any amount.

24. The Court erred in failing to state its conclusions of law separately and distinctly.

25. The Court erred in its conclusion of law that Libelant is entitled to recover from Respondent Ace Tractor and Equipment Co., Inc., as indemnity the sum of $16,250.85, together with interest thereon from date of June 7, 1950, at the rate of 7% per annum to the date of entry of final decree.

Signed and dated this 26th day of March, 1954.

LILLICK, GEARY & McHOSE,

GORDON K. WRIGHT,

By /s/ GORDON K. WRIGHT,

Proctors for Respondent.

[Endorsed]: Filed March 26, 1954. [48]

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Whereas, the Appellant, Ace Tractor and Equipment Co., Inc., a corporation, has filed, or is about to file, a notice of appeal and petition for appeal to the United States Court of Appeals for the Ninth Circuit to reverse or modify the final decree entered by the District Court of the United States for the Southern District of California, Central Division, in the above-entitled cause on February 18, 1954, and to supersede said final decree; and

Whereas, the said Appellant is required to give an undertaking, under seal, in the sum of $16,250.85, together with interest thereon from June 7, 1950, at the rate of 7% per annum to date of February 18, 1954, conditioned for the satisfaction [49] of the final decree in full with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the final decree is affirmed, and to satisfy in full any modification of the final decree and such costs, interest and damages as the Appellate Court may adjudge and award.

Now, Therefore, in consideration of the premises and of such appeal, the undersigned, National Automobile & Casualty Insurance Company, a corporation organized and existing under the laws of the State of California, and duly licensed to transact a general surety business in the State of California, does hereby undertake and promise on the part of the Appellant that said Appellant will comply with the conditions as above set forth, and does further agree that upon default by the said Appellant in any of the conditions hereof, the damages and costs, not exceeding the sum aforesaid, may be ascertained in such manner as this Court shall direct; that this Court may give judgment hereon in favor of any person thereby aggrieved against it for the damages and costs suffered or sustained by such aggrieved party, and that said judgment may be rendered in the above-entitled cause or proceeding against it.

In Witness Whereof, the said National Automobile & Casualty Insurance Company has caused

these presents to be executed and its official seal attached by its duly authorized attorney in fact, at Los Angeles, California, this 26th day of March, 1954.

NATIONAL AUTOMOBILE & CASUALTY INSURANCE CO.,

By /s/ R. L. WEBER,
Attorney in Fact.

Examined and recommended for approval as provided in Rule 8.

/s/ GORDON K. WRIGHT,
Attorney-at-Law.

Duly verified.

[Endorsed]: Filed March 26, 1954. [50]

[Title of District Court and Cause.]

CITATION ON APPEAL

To: Olympic Steamship Co., Inc., a corporation, Libelant, and Lasher B. Gallagher, Esq., and Robert Sikes, Esq., its Proctors, Greetings:

You are hereby cited and admonished to be and appear at a hearing of the United States Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 10th day of May, 1954, pursuant to an order allowing appeal filed on the 26th day of March, 1954, in the Clerk's office of the United States District Court

in and for the Southern District of California, Central Division, in that certain cause numbered Admiralty No. 12633-T, wherein [52] Ace Tractor and Equipment Co., Inc., a corporation, Respondent, is Appellant and you are Appellee, to show cause, if any there be, why the Final Decree in favor of Libelant should not be reversed and vacated and why you should not do and receive what may appertain to justice in the premises.

Witness, the Honorable Ernest A. Tolin, United States District Judge for the Southern District of California, this 26th day of March, 1954, and of the independence of the United States the 177th.

/s/ ERNEST A. TOLIN,
United States District Judge.

Service of copy acknowledged.

[Endorsed]: Filed March 29, 1954. [53]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Olympic Steamship Co., Inc., a corporation, Libelant, and Lasher B. Gallagher, Esq., and Robert Sikes, Esq., its Proctors, Greetings:

You, and each of you, will please take notice that Ace Tractor and Equipment Co., Inc., a corporation, Respondent in the above-entitled cause, hereby appeals to the United States Court of Appeals for the

Ninth Circuit, from the Final Decree in favor of Libelant entered in the above cause on the 18th day of February, 1954, for the reasons specified in its Assignments of Error filed herein, which said appeal was duly [54] allowed by the Court on the 26th day of March, 1954.

True copies of the Petition for Appeal, Order Allowing Appeal, and Assignments of Error are handed to you herewith.

Dated this 29th day of March, 1954.

LILLICK, GEARY & McHOSE,

GORDON K. WRIGHT,

By /s/ GORDON K. WRIGHT,

Proctors for Respondent.

[Endorsed]: Filed March 29, 1954. [55]

In the United States District Court, Southern District of California, Central Division

No. 12,633-T

OLYMPIC STEAMSHIP CO., INC., a Corporation,

Libelant,

vs.

ACE TRACTOR & EQUIPMENT CO., INC., a Corporation,

Respondent.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For the Libelant:

LASHER B. GALLAGHER.

For the Respondent:

LILLICK, GEARY & McHOSE, by
GORDON K. WRIGHT, and
LLOYD C. BLANPIED, JR.

Tuesday, January 12, 1954—2:00 P.M.

The Clerk: No. 12,633-T, Olympic Steamship Co., Inc., v. Ace Tractor & Equipment Co., Inc., for trial.

Mr. Gallagher: In this case, your Honor, of Olympic Steamship Co. v. Ace Tractor & Equipment Co., I offer in evidence the pretrial stipula-

tion, which was executed by proctors for the respective parties on January 11, 1952. It is a part of the record, but I want to make sure it is in evidence.

The Court: It is admitted.

Mr. Gallagher: That will be Libelant's Exhibit 1?

The Court: I think it is a part of the record. I have read it.

Mr. Gallagher: Next I offer in evidence this deposition of Gene Southerland, taken on July 17, 1953, pursuant to order and stipulation, the original of which is on file, and also the deposition of Gerald——

The Court: Before you go to the next deposition, may I inquire, are there any objections or motions to strike with respect to any of that proposed matter?

Mr. Wright: Your Honor, in the matter of the deposition of Gene Southerland, by stipulation counsel agreed that all objections, save as to the form of questions, would be reserved to the time of the trial. [2*]

My own feeling after discussing this with Mr. Gallagher a few moments ago, would be that we could probably expedite this matter if we would stipulate the court can read the several depositions, and my own feeling is that that would be a more rapid manner of disposing of it, than for counsel to read them and then we would interpose the objections.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

I would suggest that if the court feels that any matter, any of the questions or answers should have an argument as to admissibility or other proper objection, we can do that at the court recess. By and large, I think the depositions more or less speak for themselves.

Mr. Gallagher: I am in agreement with that, your Honor.

The Court: All right. The deposition to which Mr. Gallagher has just referred is admitted. I take it that understanding relative to possible objectionable matter will apply to any further depositions?

Mr. Wright: That is correct.

Mr. Gallagher: Yes, your Honor. In other words, as I understand it—and I think Mr. Wright attempted to say this, although maybe not the same way I would—unless your Honor desires to hear argument with reference to the admissibility of evidence contained in the depositions, we will proceed on the theory that everything in the depositions is accepted by the court as evidence. [3]

The Court: Well, you are flying there in the face of an assumption. If the court considers only proper evidence, I would have the duty, in the light of what you have just said, to indicate I think any part that the court does not consider is not proper.

Mr. Gallagher: Then I think that each of us should specify to your Honor what, if any, specific portion of the deposition is objected to. I have offered the whole of the deposition of Southerland.

If counsel wants to object to any question or move to strike any answer or any part of it, I think he

should do it at this time, so that your Honor could rule on it, and then the remaining portion of the deposition would be in evidence for all purposes.

The Court: Well, he probably isn't prepared to do it now, unless you want to read the whole deposition.

Mr. Wright: That is correct.

Mr. Gallagher: How are we going to handle it otherwise?

The Court: We could admit it subject to objection to be made at any time prior to submission.

Mr. Gallagher: That is all right.

Mr. Wright: Well, your Honor, perhaps maybe I was hasty. Perhaps the most expeditious manner would be to read it now and make my objections and rule on them as we go along. They are not very long, as a matter of fact. [4]

The Court: Perhaps you had better do it that way, in the light of what has been said.

Mr. Gallagher: Would you be willing to read the questions, and object to them if you want to, and I will read the answers, and you can make your motions to strike as we proceed?

Mr. Wright: Well, perhaps I could have my associate, Mr. Blanpied, read and I could follow with my copy.

Mr. Gallagher: That is all right. What is his Honor going to do for the court's copy, the original?

The Court: I will listen to what goes on just as if you were testifying like a stevedore.

Mr. Gallagher: All right, your Honor.

The Court: Afterward, after submission, I can

read them, bearing in mind the rulings which have been made.

(Whereupon, the questions were read by Mr. Blanpied and the answers by Mr. Gallagher, of the deposition of Gene Southerland:)

DEPOSITION OF GENE SOUTHERLAND

"Q. Will you state your name, please?

"A. Gene Southerland.

"Q. Where do you live, Mr. Southerland?

"A. 1308 Southeast Thirty-sixth.

"Q. Is that Portland?

"A. Portland, Oregon.

"Q. Oregon. And what is your age? [5]

"A. Thirty-five.

"Q. What is your occupation?

"A. Seaman, winch driver.

"Q. How long have you been going to sea?

"A. About 15, 16 years.

"Q. Have you followed the sea most of your working career?

"A. Waterfront since I was just a kid.

"Q. I see. Have you done other work on the waterfront other than as a seaman?

"A. Walking boss, winch driver, work in the hold.

"Q. Mr. Southerland, by whom are you employed at the present time?

"A. Coastwise Lines.

"Q. Are you attached to any vessel?

"A. SS Tarleton Brown.

(Deposition of Gene Southerland.)

"Q. Is that vessel scheduled to sail in the near future?

"A. Well, I think we are going to Longview tomorrow, and then Longview to Seattle, and Seattle to Alaska, within—we will say to Alaska within a week, I will say.

"Q. Did you ever serve aboard the Edward A. Filene? [6]

"A. You mean as a crew member? Not as a crew member.

"Q. Let me correct that. Did you ever work aboard the Edward A. Filene? A. Yes.

"Q. And on more than one occasion, or just once, as far as you know?

"A. Well, I loaded the ship in Alaska, is all that I ever——

"Mr. Wright: I move——" excuse me.

Mr. Wright: Just read the questions and answers.

Mr. Blanpied: All right.

"Q. Mr. Southerland, on June 19, 1948, a seaman aboard the Edward A. Filene was injured at Amchitka, Alaska. Will you state whether or not you were present at that time?

"A. Yes, sir. I was walking boss for the Ace Tractor Company at the time.

"Q. And what was the ship doing at Amchitka?

"A. It came in there to take a load of scrap.

"Q. What type of scrap?

"A. Well, it run everything. It was about 5,000 ton of landing mats, and there was all kinds of

(Deposition of Gene Southerland.)

vehicles, trucks, and jeeps, tractors, trailers, and then just general and broken stuff, you know. [7]

"Q. And would you state again the name of your employer at that port?

"A. Ace Tractor Company.

"Q. And who are they and what were they doing there?

"A. Well, they owned the—or bought the junk, and they employed me in Anchorage to come to Amchitka and load this load of junk on the ship.

"Q. I see. By whom was the Edward A. Filene operated at that time?

"A. You mean the company?

"Q. Yes. A. Oh, Olympic Steam, I think.

"Q. And what was the name of your job that you took? What were you called?

"A. Well, I was the loading boss. I was in charge of all loading operations.

"Q. In what way did information of this injury to Seaman Calvin Sides come to your attention?

"A. Well, I was just coming out of No. 3—I think it was No. 3 hold, now—just come on deck; and they hollered, 'Someone got hurt in No. 4.' So I run back there right away.

"Q. About what time of day was that, approximately, if you remember? [8]

"A. Oh, I really couldn't—it seems to me it was in the afternoon, but I couldn't say for sure now, because it has been so long ago, but I think it was

(Deposition of Gene Southerland.)

in the afternoon, if I am not mistaken. It could have been after supper.

"Q. Now, what actual work was being done at the No. 4 hold at that time?"

Mr. Gallagher: That was not answered, so you might as well go to the next question.

Mr. Blanpied: "Q. How many holds were being worked on the vessel on or about the time of the accident?

"A. Oh, there was 2, 3, 4 and 5 being worked.

"Q. What duties did you have in regard to the work in those holds that you named?

"A. I was in charge of loading all the hatches, and the sailors' hatch, which was No. 2—see, I would tell the mate what I had coming, how I wanted it stowed, and he would, in turn, tell the sailors. Only on occasions I would go down there and maybe change something.

"Q. What officer on the ship had any duty in regard to the over-all loading and stowage of cargo?

"A. Well, the skipper and the chief mate. Naturally, they have.

"Q. And how many men worked under you, [9] Mr. Southerland?"

Mr. Gallagher: That was not answered.

Mr. Blanpied: "Q. In your job as loading boss, did you have any supervision over any of the workmen on the vessel? A. All of them, yes.

"Q. And about how many of them worked under you?

"A. Well, let's see. Aboard ship, I would say

(Deposition of Gene Southerland.)

there was about 40—not counting the mates or the Old Man. I think about 40, between 40 and 45 men, I would say.

"Q. How long a period of time before you heard of the accident had you been in the vicinity of the No. 4 hatch?

"A. Well, it is kind of—it's been so long, it's a little hard to say exactly. See, I went from hatch to hatch all the time, and maybe I had been down in 5, or something, and maybe be 4, you know—it's so long ago, it is really hard to say just exactly when I did leave that hatch the last time.

"Q. At the time you last had observed any work being done at the No. 4 hatch, what was going on there? A. Well, they were flooring off. [10]

"Q. What does that mean?

"A. Well, we had, roughly, I would say, 5,000 ton of this landing mat, which had been bundled up, and we were flooring off and winging up tier for tier, just saving head room for our other vehicles, you see, to go on—vehicles and stuff like that, that we could roll, to go on top of this landing mat.

"Q. When you say winging off, what does that mean, particularly?

"A. Well, you see, No. 4 is about—it is about 20 feet wide, the hatch, and I think it is about 20 x 20 or 20 x 30, something like that. Well, you can only land so many loads in the square to make an even floor, and then you have to go out into your wing tiers, and this landing mat weighed, oh, I would say, roughly, a ton a load, just about that, so

(Deposition of Gene Southerland.)

the only way you can stow your wing tiers is to use snatchblocks and your gear to stow your wing tiers to come out to your square. See, you come like——

"Q. Pardon me. Could you draw just a rough cross-section of the hatch, showing what you are describing, showing us how the lines run, and the use of the snatchblocks?

"A. Here is the skin of your ship out like this and like that. Now, as you bring your loads [11] into your hatch, this wing out here—here is the square of your hatch—this wing, of course, all has to be stowed."

Mr. Gallagher: Parenthetically the deposition shows an indication by the reporter that the witness was drawing, and I will offer in evidence the exhibit which is attached to the deposition.

Mr. Wright: At this time we will object to that, as I believe it will be shown later or already has been shown that the witness was not present at the time of the accident. Perhaps it would be better to get the entire deposition in.

The Court: It is rather difficult to rule with a full understanding on an objection at this time. You have saved your right to urge on the lack of foundation, until it becomes more apparent.

Mr. Blanpied: "Q. Would you write 'wing' where you have marked those two?

"A. Yes (writing). I would say—say we floor off just about four high everytime that you build a floor in here. Here is just about the way your hatch would run here. This is the forward bulkhead

(Deposition of Gene Southerland.)

and the after one, and this here is the skin of the ship out here, of course (writing). Say that we are starting right on the skin, right on the floor of the ship in the lower hold. You would [12] start in the wing, would be the best, and you would come out maybe, oh, four high, I would say, just roughly, about four high. Well, you keep coming along four high, four high, four high, until you get out to where you can use your gear to load them. In this case here we would bring in on each side of the shaft alley—I should have put that in down at the bottom of the hold there. The shaft alley runs down the square of the ship.

"Q. Will you mark that?"

Mr. Gallagher: The witness wrote on the diagram.

"You would bring in, oh, say ten loads or something like that on each side, and land them down here. Then you take your runner, which is either the port or the starboard side—we will say the port side—and put your runner through the snatch block, your yard runner, lead it right into the blacksmith the same as it was, and start stowing your wing here (indicating throughout).

"Q. Could you draw a cross-section of the hatch looking fore and aft so you could show us how the runner would go from the gear down to the snatch block in over to the load—in other words, a cross-section as you look forward, we will say?

"A. I am not much of an artist, here. [13]

"Q. It would have to be on a separate——

(Deposition of Gene Southerland.)

"A. You want it on a separate one?

"Q. Now, is that a plan view you are showing us that you have drawn—in other words, you are looking down on the ship from above in that view?

"A. Yes.

"Q. Could you slit that ship in half on a piece of paper?

"A. This is just the after end of the ship, you see—No. 5 hatch.

"Q. Yes. A. 4.

"Q. On this sheet of paper, could you just slice the ship right down the center of No. 4 hatch, showing the hatch opening, and then show how the runner goes?

"A. Well, I don't know. I will try. I think about the best way is to show your gear set up the way it is, the way it would be. Here is the square of the hatch, here. Here is your winches here. The booms—I just have to show the way the booms would run out. This one here would run about out like that, and the runner——"

The Court: Were those indications being made on the drawing? [14]

Mr. Gallagher: I think so, your Honor.

Mr. Wright: It don't show on the deposition, your Honor. They are reading all——

The Court: It sounds as if he were giving indications——

Mr. Gallagher: It may be.

The Court: ——gestures and the like.

(Deposition of Gene Southerland.)

Mr. Gallagher: That is what happens when you have competent counsel representing both sides when you take a deposition. They let the witnesses do that, and maybe it is all on the diagram.

"——would come in, and this boom over here, of course, is going to be lower. It comes out over the side of the ship. The runner comes in here, the blacksmith. I don't know how I could show this—that just shows the square of the hatch, and this runner, here—in this case, the port runner—goes back here under here to a snatch block (drawing).

"Q. I wonder, could you dot that line indicating that it is under the deck?

"A. (The witness marked on the diagram.)

"Q. And now would you mark where the snatch block is?

"A. It comes back out again. The snatch block——"

Mr. Wright: At this point Mr. Wright says: [15]

"It being understood that, I assume, counsel, that this is a hypothetical diagram showing a customary or usual general arrangement of how this is used."

Mr. Gallagher: "Mr. Holland: That is agreeable. All right."

And the witness continuing:

"I don't know if anyone can tell anything. I know what it is, but I doubt if anyone else will."

Mr. Blanpied: "Q. Now, Mr. Southerland, the method that you have described and which you have drawn in the two sketches, will you state whether or not that method was being used at any time at

(Deposition of Gene Southerland.)

No. 4 hatch prior to the accident—in other words, the method of winging out that you have shown us?

"A. Oh, yes. We had come up—oh, we must have come up one or two floors, at least.

"Q. Now, how was the snatch block fastened, or secured, to the side of the ship, the skin of the ship?

"A. Well, see, there is a beam—it is all ribs running down along the side, and we had the snatch block—had a strap through a hole in one of the ribs or beams, whatever they want to call them.

"Q. When you say 'strap,' would you tell [16] us what that is? What do you mean by that? Just describe it in words.

"A. In this case, it was a short wire strap. It is a strap with two eyes in it, an eye in either end, and, of course, you have the bight through a hold or pad eye or beam clamp—whatever the case may be that you have to use at the time, you know.

"Q. Where this work was being done on the vessel, Mr. Southerland, was any gear used except the ship's own gear?"

Mr. Wright: At that juncture I objected to the question as being incompetent and irrelevant, stating we were only concerned with particular gear.

The Court: The objection is overruled.

Mr. Blanpied: "You may answer that."

Mr. Gallagher: "Well——"

Mr. Blanpied: "Let me rephrase the question."

Mr. Wright: Mr. Wright then says:

"Excuse me. Let the witness answer the question, if you please."

(Deposition of Gene Southerland.)

Mr. Gallagher: "The cargo gear naturally belonged to the ship—I mean the booms and runners and that sort of stuff. As far as slings and all that stuff, we furnished all of our own slings and that stuff but——" [17]

Mr. Blanpied: "Q. When you say 'we,' you mean whom?"

Mr. Gallagher: "A. Ace Tractor Company.

"Q. And referring specifically to straps which you have described, will you tell us who furnished those?

"A. Well, we furnished—we had a gear man that made the gear, and we had our own wire and gear and all, and we had a shop on the dock where he made this gear.

"Q. And would you tell us whether or not the strap which you have described as a part of the gear that you mentioned—in other words, when you say you had a man who made the gear, would that include straps, or not?

"A. Yes; all the stuff that we used to work—all the slings, straps, spreaders, and stuff like that was made by our gear man.

"Q. Do you have any knowledge as to whether or not a strap and snatch block was being used at the time of Mr. Sides' injury? A. Oh, yes.

"Q. And do you have any knowledge as to whose strap that was?

"A. Well, as far as I know, it was ours, but [18] now if someone happened to pick up a strap, I wouldn't—to the best of my knowledge, I would

(Deposition of Gene Southerland.)

say that it was ours, but I won't swear that I know that it was ours, because you know when they are loading the ship and everything is in a hubbub why if your arm was there and they wanted to use it they would just put it in a snatch block and use it when they get excited, you know.

"Q. Do you recall the name of the man you described as a gear man, who made up this various equipment? A. No, no more, I wouldn't.

"Q. Do you recall having at any time had any difficulty with the man on the dock who was making up this gear for Ace Tractor?"

Mr. Wright: At that juncture I objected to the form of the question as being vague and indefinite at that time. I will supplement it by stating that in my opinion it is irrelevant and immaterial.

The Court: It is vague and indefinite. It calls for whether he has any idea. It doesn't call for positive knowledge, so I will sustain it on that ground.

I think it is relevant if it be made sufficient in particular, so it calls for a specific knowledge instead of general surmise. [19]

Mr. Gallagher: I want to call your Honor's attention to that question, if I may. The question is:

"Do you recall having at any time had any difficulty with the man on the dock who was making up this gear for Ace Tractor?"

Now, I respectfully——

The Court: I had confused——

Mr. Gallagher: The question with the objection.

(Deposition of Gene Southerland.)

The Court: ——the question with the objection. I am sorry. In the light of that I will reverse myself. I think it is a good question.

Mr. Gallagher: "A. Well, when we started loading these bundles of landing mat, they use two plugs. They are about—must be about 18 inches long, and there is a wire strap from those two plugs, and they have—they must be about 3 foot long spliced in, and with an eye on the other end that goes on the blacksmith. Well, we were pulling these splices out, and I fired Ace Tractor Company's gear man and put another man in there splicing the wire."

Mr. Wright: At which time counsel for respondent will move to strike the answer on the ground it is not responsive.

Mr. Gallagher: At which time?

Mr. Wright: At this time.

Mr. Gallagher: Well, I think the time to make that [20] motion, your Honor, was when the answer was given. He is making a motion to strike an answer on the ground it is not responsive.

The stipulation provides that all objections, except as to the form of the questions, and irresponsiveness of the answers, may be reserved until the time of trial.

So if counsel wanted to make a motion to strike on the ground that the answer was not responsive, it was his duty to do that at that time.

The Court: I think that is right. Don't you, Mr. Wright? You don't have to commit yourself.

(Deposition of Gene Southerland.)

Mr. Wright: Yes, your Honor, I completely agree with that, because if I stipulated to that, it was something I generally don't do. That is why I didn't——

Yes, I will withdraw my motion.

Mr. Blanpied: "Q. Mr. Southerland, do you know who was driving the winches at the time Sides was injured—that is, the winches at the No. 4 hatch?

"A. Oh, yes, I know him. I can't think of the name now. It is another thing.

"Q. Well, I will ask you, do you recall whether or not it was a man named Bigsley?

"A. Yes, Bigley or Bigsley.

"Q. Bigsley. Where did you first meet or know Mr. Bigsley? [21]

"A. Oh, he was there helping gather the scrap up, I guess, when I got there. I met him there when I came out to load the ship.

"Q. And by what company was he employed?

"A. He was employed by Ace Tractor Company.

"Q. And what work did you give him when you reported to the operation?

"A. Well, this Rodney Dean gave him—told me he was a winch driver.

"Q. Now, who is Rodney Dean?

"A. He is the—he was the expediter, I guess, for Ace Tractor Company.

"Q. And by whom was he employed?

"A. Ace Tractor Company.

"Q. And what did you do with Mr. Bigsley concerning Mr. Dean's comments?

(Deposition of Gene Southerland.)

"A. I put him on a set of gear.

"Q. At any time did you form any conclusion, after observing his work, as to his ability or inability to operate winches?"

Mr. Wright: Whereupon, I object as it calls for the conclusion of the witness. No proper foundation has been laid for the expression of any expert opinion. It is incompetent, irrelevant and immaterial.

Mr. Gallagher: This man testified he was a winch driver [22] himself and has been doing this kind of work since he was a kid.

The Court: He was a walking boss on the job.

Mr. Gallagher: Yes.

The Court: Objection overruled.

Mr. Wright: May I argue that just a moment?

The Court: Yes. I think it might be open for considerable inquiry as to its weight. But as to admissibility I think it is admissible. You can talk me out of it, if you can.

Mr. Wright: I will refrain from discussion at this time.

Mr. Blanpied: "Answer that."

Mr. Gallagher: "A. Well, he isn't a competent winch driver."

Mr. Wright: Whereupon, I moved to strike the answer and objected to the question on the ground that it was vague and indefinite as to the time that the opinion was formed.

Mr. Gallagher: Well, the question was:

"At any time did you form any conclusion, after

(Deposition of Gene Southerland.)

observing his work, as to his ability or inability to operate winches?"

Now, this may be an opinion thing in the case, your Honor, because——

The Court: What was the answer?

Mr. Gallagher: The answer was:

"Well, he isn't a competent winch driver." [23]

The Court: Well, would you mind just marking that on the deposition so I can readily find it?

Mr. Gallagher: You had better mark it on the original. It is on page 15, your Honor, lines——

The Court: Tell me what kind of an identifying mark you are putting on it and I will reserve ruling on it.

Mr. Blanpied: I will put an X in the right-hand margin.

Mr. Wright: You might dog-ear pages 15 and 16.

The Court: The court reserves ruling on the objection.

Mr. Gallagher: At this time, so your Honor may have it in mind, this point may become a very important point in this case, in this respect: If a person is brought aboard the ship, whether as a seaman or as an employee of an independent contractor, to operate ship's equipment——

Mr. Wright: If the court please, I believe this is an inopportune time to argue the case.

Mr. Gallagher: I am not going to argue the case. I am just pointing the judge's attention to this question.

(Deposition of Gene Southerland.)

Mr. Wright: I believe he has it well in mind and I submit argument at this time is improper.

Mr. Gallagher: The court has reserved ruling.

The Court: I will reserve argument, also.

Mr. Gallagher: Argument also reserved.

The Court: I will ask you to please treat this specific objection in the argument or memorandum, whichever [24] we decide upon.

Mr. Blanpied: "Q. Mr. Southerland, at what time after you reported to the vessel to work did you form any opinion as to Mr. Bigsley's competency or incompetency to drive winches?

"A. When he first went to work."

Mr. Wright: Excuse me. May I move to strike the answer, in order to interpose the same objection to that question as I did to the other, on the grounds it is irrelevant, immaterial and incompetent, and, further, it calls for a conclusion of the witness.

The Court: It will be deemed treated in the same submission, and you may treat it in the same argument.

Mr. Wright: Thank you, sir.

Mr. Gallagher: I would like to have this exception: Counsel did not object to the question at the time it was asked upon the ground it called for a conclusion of the witness, and a question which calls for a conclusion of the witness must be objected to because that goes to the form of the question.

It does not have to do with relevancy or competency or materiality, and no such objection was made. That has been added now.

(Deposition of Gene Southerland.)

The Court: Well, there we are getting into a quarrel with my old friend, Professor [25] Wigmore.

Mr. Blanpied: Shall I mark that with an X?

The Court: Please mark that with two X's.

Mr. Gallagher: "When he first went to work."

The Court: How much more of this deposition?

Mr. Gallagher: We have 36 pages altogether, and we are on page 16.

The Court: We will take up this other matter then.

(Other court matters.)

Mr. Blanpied: "Q. What experience have you, yourself, had in driving winches, Mr. Southerland?

"A. About, oh, twelve years, I guess.

"Q. And could you tell us just briefly, as laymen, what you, as an experienced winch driver, observed about Mr. Bigsley that permitted you to form a conclusion that he was not competent?

"A. Well, I don't know how to explain it to you.

"Q. Well, in other words, just what you saw him do and what it meant to you."

Mr. Wright: Your Honor, I will object on the ground of irrelevancy, immateriality and incompetency.

The Court: May I have the question again?

Mr. Gallagher: "Well, in other words, just what you saw him do and what it meant to you," which amplified the first question, "and could you tell [26] us just briefly, as laymen, what you, as an experi-

(Deposition of Gene Southerland.)

enced winch driver, observed about Mr. Bigsley that permitted you to form a conclusion that he was not competent?''

Mr. Wright: Well, counsel, you are interpolating there, are you not?

The Court: It is included, I think, in the general consideration of whether we are going to take the opinion of this witness on this subject. I will reserve ruling on that. Put three X's opposite that question.

Mr. Gallagher: ''A. Well, here is—one way—now, you take a person that has any experience around gear like that—you know that gear is tested for five ton, but it isn't a good idea to take five ton right off the dock, although it is done lots of times, but someone like him, you could tell him to pick up ten ton with it, and he just has no idea of what the gear can do. I mean he is—put it this way: If he was here in the States where you had men, they wouldn't even let him take one load in. When he took one load, that would be the end of him.

''Q. Did you have any conversation with the officers of the vessel prior to the accident concerning the incompetency that you observed in Mr. Bigsley?

''A. Not that I can recall, no.

''Q. And from your observation of the work [27] being done there, and particularly the supervision of the captain and chief mate, would you state whether or not, in your opinion, they would have any reason to know of Mr. Bigsley's ability or inability to properly drive winches?''

Mr. Wright: I object on the ground it calls for a conclusion of the witness, and, further, at this

(Deposition of Gene Southerland.)

time I will object to it as being irrelevant, incompetent and immaterial.

At the time I voiced the objection I said it called for a conclusion.

The Court: What is that question again?

Mr. Gallagher: "And from your observation of the work being done there, and particularly the supervision of the captain and chief mate, would you state whether or not, in your opinion, they would have any reason to know of Mr. Bigsley's ability or inability to properly drive winches?"

The Court: I will sustain that objection.

Mr. Gallagher: Will you read the next question, please?

Mr. Blanpied: Yes. It is down at the bottom of page 18, I believe.

Mr. Gallagher: 17.

Mr. Blanpied: Excuse me. Yes, 17.

"Q. From your experience as a winch driver and from observing the operation going on at Amchitka just [28] prior to the accident, could you tell us just whether or not, in your opinion, the officers would have any reason to know that Mr. Bigsley was incompetent? Just 'Yes' or 'No.'"

Mr. Wright: There I objected to that as calling for a conclusion of the witness.

The Court: Well, I think he could state an answer to that. It doesn't disclose every subject, of course, but he is asked if he knows of any reason why they would know, and possibly if he heard some safety director run and warn the captain,

(Deposition of Gene Southerland.)

something of that sort. We don't know. He can state whether he had any reason, can't he?

Mr. Wright: Your Honor, the question is, "Could you tell us whether or not, in your opinion, the officers would have any reason to know that Mr. Bigsley was incompetent?"

I submit it calls for the rankest type of conclusion.

The Court: Well, I think it is rather artlessly put, but it actually calls for knowledge, and unless it is followed up, if he says, "Yes," unless he follows it up by showing some good reason the yes answer doesn't mean anything, anyway.

Mr. Blanpied: "Do you want the question again? The last question was read."

Mr. Gallagher: "A. No, they wouldn't have any reason, because they had nothing to do with the longshoremen." [29]

Mr. Wright: Whereupon, I moved to strike the answer as not responsive.

The Court: All except the "No" is stricken.

Mr. Wright: All except the "No"?

The Court: All except the "No" is stricken.

Mr. Blanpied: "Q. Assuming, Mr. Southerland, that the landing mats were being winged out, as you described it, by use of a snatch block and a strap on the skin of the ship, and assuming that the strap was not defective in any way, but that as a result of this work the strap did part, would you tell us from your experience as a winch driver what could have caused such an incident?"

(Deposition of Gene Southerland.)

Mr. Wright: At that time I objected to the question as calling for a conclusion of the witness, no proper foundation having been laid for the giving of any expert opinion as to the casualty.

And I will further submit at this time it is incompetent, irrelevant and immaterial.

Mr. Gallagher: Well, I resist counsel's objection. It is a hypothetical question.

The Court: Let's hear the hypothetical thesis.

Mr. Gallagher: It says, "Assuming, Mr. Southerland, that the landing mats were being winged out, as you described it, by use of a snatch block and a strap [30] on the skin of the ship, and assuming that the strap was not defective in any way, but that as a result of this work the strap did part, would you tell us from your experience as a winch driver what could have caused such an incident?"

Now, there was no objection at the time on the ground that the form of the hypothetical question was defective. It does call for a conclusion of the witness, without any doubt, but this man has been a winch driver and working on ships for 10 or 12 years, and at least he has had experience which would make him an expert on this particular kind of work.

The Court: Well, we will have to weigh the answer, together with such other answers as will, and other evidence that will show whether he was qualified, the degree of qualification to express whatever opinion he does express.

(Deposition of Gene Southerland.)

We all know there are many things, such as an automobile skids on a street, such as we have today, wet street, an expert can tell you that the reasons would be one of four or five.

And I think this comes within such a general classification, and hence the objection is overruled.

Mr. Gallagher: "A. Well, you see, when you are heaving on anything like that that has to be stowed out in the wing, and you are using a snatch block, you just have to barely float it, because you [31] have such poor drift anyway that you are almost pulling against the two runners, and if you try to go too high you start pulling against the two runners, and something has to carry away. I mean something just has to give if you keep heaving on it."

Mr. Blanpied: "Q. Is there any particular expression you use by the stevedores for such an action of the runners as you have described?

"A. Well, tight-line them.

"Q. All right. How soon after you heard the cry which indicated to you that an accident had happened did you arrive at the No. 4 hatch?

"A. Oh, within a minute or so.

"Q. And at that time, at the time you arrived, did you observe who was on the winches?

"A. The winch driver.

"Q. And which winch driver?

"A. I can't think of his name.

"Q. The same one? A. Yes, the same one.

"Q. Bigsley? A. Yes, Bigsley or Bigley.

(Deposition of Gene Southerland.)

"Q. How many other winch drivers were working on the vessel other than Mr. Bigsley?

"A. Well, there was two winch drivers with [32] each set of gear—that would be two, four, six—that would be seven others besides him.

"Q. What, if anything, did Bigsley ever say to you concerning his experience at driving winches?"

Mr. Wright: Whereupon, I objected on the ground of hearsay.

The Court: Sustained: If that shocks anyone, they can tell me why.

Mr. Gallagher: Off the record. I am not shocked.

Mr. Blanpied: "Q. What type of winches do they have?"

Mr. Gallagher: Well, I don't think that——

Mr. Wright: That is not relevant now.

Mr. Gallagher: That is unintelligible, in view of the objection being sustained to the last question.

The Court: So you are not offering that part of the deposition?

Mr. Gallagher: No. Your Honor told Mr. Allen to bring the jury back at a quarter of 3:00, regardless of whether it had or had not arrived at a verdict.

As long as we have reached the point of cross-examination, could I put a young lady on from the County Clerk's Office? I just want to offer a file in another action, and she can go.

The Court: Yes.

Mr. Wright: I assume she is here. Somebody is here with [33] it.

The Clerk: The man in the blue suit.

Mr. Gallagher: Who is here from the Clerk's Office, the County Clerk's Office, with the file?

The Court: We will take that evidence and then recess until after we have done our work in connection with the other case and taken the afternoon recess.

Mr. Gallagher: Yes, your Honor.

Will you take the stand, please, sir?

MICHAEL C. NICCOLI

called as a witness on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Michael C. Niccoli.

Direct Examination

By Mr. Gallagher:

Q. What is your occupation?

A. Deputy Superior Court clerk.

Q. You are here in response to a subpoena directing the County Clerk to appear here and bring with him the file of the Superior Court, State of California, in and for the County of Los Angeles, entitled Calvin H. Sides v. Ace Tractor & Equipment Co., Inc., a corporation, No. 558,573?

A. That is right.

Q. Is that correct? [34] A. That is right.

Q. You have brought the file?

A. I have brought the file.

(Testimony of Michael C. Niccoli.)

Mr. Gallagher: I offer it in evidence, if your Honor please, as Libelant's Exhibit next in order.

The Court: That is going to get us into a procedural problem. I suppose the witness will want to take his file back, won't you?

The Witness: Yes.

The Court: You are under instructions to take it back?

The Witness: Yes. I can't leave it.

Mr. Wright: I have a copy of the Complaint and the Answer, and I assume Mr. Gallagher does. I have no objection to those being substituted.

Mr. Gallagher: Then we don't need the original, but we would need, at least, a recitation of certain matters which are in the file. No. 1, that——

Mr. Wright: Of course, I at this juncture want to interpose an objection on the ground I fail to see the relevancy or materiality of this offer.

Mr. Gallagher: That is all right. And I would ask your Honor to put that in the same category as the other objections, to be argued either at the submission of the case orally or in writing.

The Court: You have treated of this very subject in the [35] stipulation on file?

Mr. Gallagher: That is right.

The Court: I think any objection will probably have to go to the general weight and that this is, if for no other reason, admissible to show us the general factual background out of which the case arises, so we may orient ourselves to various points which are in issue.

(Testimony of Michael C. Niccoli.)

Mr. Gallagher: Can we stipulate, subject to the objection, that there was a request for entry of dismissal with prejudice filed in the Superior Court action on January 31, 1950, and it was signed by Calvin H. Sides' attorneys of record in that state court action, and the action was dismissed with prejudice, pursuant to that request, on the 3rd of February, 1950?

Mr. Wright: Yes, I will stipulate, but I cannot stipulate that Calvin H. Sides authorized the filing of the Complaint. But I assume that he did.

We will withdraw that. I will stipulate that such a request for entry of dismissal was filed on that date.

Mr. Gallagher: Thank you.

The Court: Do you want to read any other part of it into the record?

Mr. Gallagher: No, your Honor, because we have stipulated to introduce the copy of the Complaint and the copy of the Answer. [36]

Mr. Wright has them, and if he will produce them we will offer those in lieu of the originals.

Mr. Wright: Do you have just a minute, to see if these are the same, your Honor?

The Court: Yes.

Mr. Gallagher: We will ask these be received as Libelant's Exhibits next in order.

Mr. Wright: No objection.

Mr. Gallagher: They constitute a copy of the Complaint in the Superior Court action of Calvin H. Sides v. Ace Tractor & Equipment Co., Inc., and

(Testimony of Michael C. Niccoli.)

a copy of the Answer filed by Ace in that action, both pleadings being certified.

The Court: Admitted.

The Clerk: Superior Court Complaint will be Libelant's 2 and the Answer, Libelant's 3.

(The documents referred to were marked Libelant's Exhibits 2 and 3 and were received in evidence.)

Mr. Wright: Your Honor, I think we should note that the Complaint is not verified by Calvin Sides. It is verified by his local attorney, Mr. Dee B. Tanner. Is that correct, counsel?

Mr. Gallagher: That is correct.

Mr. Wright: Thank you.

The Court: Do you want to look at this file from the County Clerk's Office before the witness goes?

Mr. Wright: No, your Honor. I have no questions of him. [37]

The Court: To be sure you don't call the County Clerk back for something which he could very well take care of in one visit.

Mr. Gallagher: He may be excused, as far as we are concerned.

The Court: All right.

The Witness: Thank you.

Mr. Gallagher: Thank you for coming over.

(Witness excused.)

Mr. Gallagher: Does your Honor want to take a little recess, in view of that——

The Court: The jury asked for a little more time. I don't know what they thought I was going to do to them.

Mr. Gallagher: Five minutes.

The Court: Let's go forward for a few minutes.

Mr. Wright: We might let Mr. Blanpied read Mr. Wright's questions, and the answers be read by Mr. Gallagher on cross-examination now.

Mr. Blanpied: This is cross-examination of the witness, Gene Southerland, at the time of the taking of his deposition in Seattle, Washington. Counsel for respondent was Mr. Gordon Wright.

DEPOSITION OF GENE SOUTHERLAND

Cross-Examination

"Q. Mr. Southerland, did you ever sign any statement concerning the accident to Calvin H. Sides?

"A. I think right here I did, in this office. [38]

"Q. Have you seen that statement recently?

"A. No. No, I haven't."

Mr. Wright: "I address my question to counsel for Libelant, and ask if such a statement is in his possession. If so, I request to view a copy of it."

Now, at this juncture I respectfully submit that the court should take notice of the reply given by counsel for libelant at the time, bearing in mind that the foundation had been earlier laid on direct examination of the possibility that this witness would not be present at the time of the trial. Will you read that?

(Deposition of Gene Southerland.)

Mr. Blanpied: "Mr. Holland: Yes, it is in my possession, but it is available under proper motion for production and not at this time.

"Mr. Wright: Very well.

"Q. Mr. Southerland, when did the ship commence loading scrap at Amchitka prior to this accident to Mr. Sides?

"A. It came in prior to—around noon, I believe. We started getting everything ready and started work that afternoon.

"Q. The accident happened, then, the day that operations were commenced? A. No, no.

"Q. How many days prior to the accident had the [39] loading operation been under way?

"A. Well, I wouldn't say right exactly the day, but I would say it must have been about, oh, maybe five days, something like that.

"Q. And during those five days prior to the accident, loading was taking place in all five of the hatches at various times?

"A. I believe we had worked all five. See, No. 2 worked steady all the time with sailors, and then the other gangs as we shifted around. Maybe I hadn't went in No. 1 yet. I wouldn't say for sure.

"Q. Now, the sailors were loading No. 2 by themselves. Is that correct?

"A. Yes. They had no longshoremen there.

"Q. And some of the members of the crew of the Edward A. Filene were acting as hatch tenders and winch drivers at No. 2. Is that correct?

(Deposition of Gene Southerland.)

"A. Well, they had their own winch drivers, yes.

"Q. Now, in addition to the sailors working No. 2 hatch, they were also working other hatches in conjunction with the men from the shore that Ace Tractor had brought over to Amchitka. Isn't that correct?

"A. We hired everyone we could—I mean for extra men, yes. [40]

"Q. And not only did you hire members of the crew, but you also hired officers of the Edward A. Filene to assist in this loading operation. Isn't that correct?

"A. You mean like on the watch below or anything—yes.

"Q. And particularly the second mate was one who worked down in the holds in the loading operation? A. Bob White, yes.

"Q. And also the chief officer?

"A. I don't think that he worked—see, he was on deck all the time. You know what I mean.

"Q. In other words, the chief officer was on deck generally supervising the operation at all times, wasn't he? A. No. No. 2 hatch——

"Q. He didn't exercise any supervision or inspect any of the hatches other than No. 2, to your knowledge, before this accident?

"A. Oh, they inspected for stowage, yes.

"Q. And in addition to the chief officer inspecting for stowage, the master also inspected the hatches other than No. 2, did he not, before the

(Deposition of Gene Southerland.)

accident? A. Yes, sir; yes, sir. [41]

"Q. Now, do you know whether the chief officer and/or the master received any compensation for those inspections?

"A. Well, I wouldn't know about that.

"Q. Now, with respect to members of the crew of the Edward A. Filene, who worked in these hatches, other than No. 2, did you have anything to do with approving the time sheets turned in for their work? A. Yes.

"Q. In other words, you more or less certified that a particular crew member had worked so many hours on a particular day. Isn't that correct?

"A. Yes.

"Q. Do you know how such a crew member was compensated for work in handling cargo in other than No. 2 hatch?

"A. Well, I don't remember too well now, but I understood that it went in with the chart or some way—that is, the loading operations—except the extra men who were hired. I think they were paid by check when they went down south, but I wouldn't, you know, I wouldn't say. That is just what I was told, and it has been so long ago that I——"

Mr. Blanpied: Indication of pausing.

"Q. Now, in connection with the operation of [42] snaking or pulling the lifts in No. 4 in under the wing, a great many slings were used, were they not?

"A. Well, no, sir. We weren't using slings. We were using these plugs in these landing mats.

(Deposition of Gene Southerland.)

"Q. The plugs were used to hold the mats into a bundle. Is that right?

"A. No. These mats were bundled up, and then they had a wire around them, and there's holes—I don't know whether you have ever seen that landing mat or not.

"Q. Yes, I have. A. You have?

"Q. Yes.

"A. Then you understand those holes. Well, those holes line up, and you drop these two plugs right down in through these holes, you see. They are a steel plug about that big around (indicating). They drop right down through, and then, of course, the strap comes here and binds them.

"Q. So that they don't shift when you are putting them in? A. Yes.

"Q. Well, now, you saw, did you not, the strap which parted in No. 4?

"A. Yes. I rigged—I was there—it was [43] rigged under my supervision.

"Q. You actually rigged that particular sling to which the snatch block was secured?

"A. Well, I didn't do the work, but I was there and supervised it.

"Q. Well, who actually rigged it?

"A. It has been so long ago now—the gang that was in the hold.

"Q. Well, was it rigged to a beam, or was it rigged through a pad eye?

"A. Well, let's see, now.

"Q. If you don't know, just say you don't know.

(Deposition of Gene Southerland.)

"A. Well, I wouldn't say, now, because that was shifted so many times, you know, right then at the time.

"Q. In other words, this strap would be taken out and shifted to perhaps another structural member or to another pad eye on the side of the ship underneath the wing, as necessary from time to time? A. Yes.

"Q. And, of course, you weren't there every time that the strap was shifted, were you? The men in the hold would do the shifting as they deemed necessary. Isn't that true?

"A. Well, no. I was there because they [44] were more of a green gang, unless there happened to be someone there that was competent to do it, but as far as—I would say that most of the time I was there.

"Q. Well, it is a fair statement, isn't it, that you weren't there every time this strap was taken off and the snatch block moved from one particular spot to another along the frame, the outside frame of the ship? A. I guess that is true.

"Q. Now, as a matter of fact, there were more than one strap similar to the one that parted in No. 4, weren't there?

"A. I am not quite—let's see, now. There was more than one strap down there in the hatch.

"Q. There was more than one strap in No. 4 of a similar design to the one which parted?

"A. Oh, yes.

"Q. As a matter of fact, on the ship you had

(Deposition of Gene Southerland.)

about 100 straps that were similar in design and dimensions and size to the one that parted. Isn't that true?

"A. No, I wouldn't say that many of that certain type.

"Q. Well, say 50, then. [45]

"A. I think even that is a little bit strong. I mean—see, a short wire strap like that isn't—you just don't use them too—you see, we weren't using that on the cargo. If we had been using that on the cargo, then I would say, Yes, that there was that many down in the hold, but there was—I would say there was several of them around there. There was one—maybe two or three like that, laying around in the hold.

"Q. Mr. Southerland, this operation of securing a snatch block underneath a wing to maybe the side of the ship, or to a pad eye along the side of the ship, that is frequently done, isn't it, when you are snaking in cargo from the square into the wings?

"A. Yes.

"Q. Sometimes considered better practice not to use the standing gear for snaking purposes, though, isn't it? A. Well, I am——"

Mr. Wright: He didn't answer it, anyway.

Mr. Blanpied: There was an objection.

Mr. Gallagher: "A. I don't quite——"

Mr. Blanpied: Well, the question again by Mr. Wright:

"Well, from your drawing, I gathered that you

(Deposition of Gene Southerland.)

were using your standing gear—in other words, the [46] booms—to snake this in?

"A. Oh, we never—no, unless you—if you are in a place where you have a stowing winch and you rig a snatch block in the hold and you have a stowing winch, that is just so that you can keep the hook moving. It doesn't matter whether you take your runner out of your gin box or not, or out of your booms.

"Q. Are you familiar with any regulation of the Pacific Martime Association prohibiting the use of booms when snaking cargo?

"A. Up there—there is no prohibitions up in that country, none whatsoever. You do what you think you can get away with up there. I mean under the circumstances—you understand that they hire anybody on those jobs, and they don't understand a ship; they don't understand gear. And you have to get by just the best way you can. I mean up there it isn't like here. They have a lot of practices that you don't follow up north, and every port has different ones.

"Q. Well, then, you are familiar with some regulations which frown on the use of standing gear to snake cargo?

"A. Personally, I have never run across it, [47] but I won't say that they don't have them, because, like I say, every port they have a little different regulations.

"Q. Now, you don't recall, as I understand your testimony on direct, whether this particular strap

(Deposition of Gene Southerland.)

that parted in No. 4 was rove through a pad eye, or just through one of the apertures in the frame along the skin of the ship. Isn't that correct?

"A. Yes. It could have been through a limber hole or—I don't remember now just what it was.

"Q. What did you call it—a limber hole?

"A. That is what I call them. I think they have other names for them, but that is what I call them.

"Q. Well, that is a hole, is it not, that is formed by the meeting of two—well, we will say the rib and one of the overhang beams?

"A. Or where there is a hole cut in—they have those holes cut in, you know.

"Q. Yes. And, for example, if you have a standing rib, they are designed with holes in them?

"A. Yes.

"Q. Maybe about three or four inches in the steel plate? A. Yes. [48]

"Q. Now, let me ask you, if you have a strap that is rove through one of these holes, it comes in contact with a relatively sharp edge, does it not?

"A. Yes.

"Q. And by continued use or by excessive strain, it is possible that the strap will be cut by this—by the side of this aperture through which it is rove. Isn't that true? A. Yes.

"Q. Now, do you know whether or not the chief officer was a winch driver? Let me reframe the question. Perhaps it is not too intelligible. Do you know whether the chief officer of the Edward A.

(Deposition of Gene Southerland.)

Filene was experienced in running winches of the type that were aboard that vessel?

"A. Well, as far as actually being a winch driver, I don't think he was, but I wouldn't——

"Q. As a matter of fact, you had seen him run one of those winches, a set of those winches, hadn't you?

"A. Not the chief mate, I don't think.

"Q. Well, then, is it a fair statement to say you don't know whether he was an experienced winch driver or not?

"A. I think that is better. [49]

"Q. All right. Well, did you ever see the skipper operate one of the winches on the Edward A. Filene?

"A. Yes, I seen the Old Man run one.

"Q. Which set of gear was he running when you saw him operate winches?

"A. Oh, I think he relieved several of the winch drivers at different times.

"Q. You mean several times before this accident happened on board the Filene?

"A. He would relieve them for a cup of coffee or something like that, you know.

"Q. Was that an east coast or west coast rig that they had those winches on?

"A. She was west coast. They had turned the winches and put levers on them—that is, one man operate them.

"Q. So that two winches could be operated by a single man standing between them? A. Yes.

(Deposition of Gene Southerland.)

"Q. When did you form an opinion that this chap whom you noticed at the winches, at No. 4, right after the accident, was incompetent as a winch driver?

"A. Oh, when we first started working cargo.

"Q. Would you say two or three days [50] before?

"A. Well, whenever we started working cargo—four or five, or whatever it was.

"Q. It was quite obvious to you that he didn't know what he was doing? A. Yes.

"Q. But you nevertheless let him go ahead and continued to run this gear?

"A. I had no alternative.

"Q. You had a chap by the name of Fink who was about to run winches who was on board?

"A. He was on another set of gear at the time.

"Q. At which time are you referring to—at the time of the accident?

"A. See, at the time of the accident, I think he was tending hatch at No. 4, I think at that time, either that or he was driving 5. I forget just what it was now.

"Q. Well, if I were to tell you that he testified in one of these preceding proceedings that he was tending hatch at No. 4 at the time of this accident, would that refresh your recollection as to what he was doing at the time?

"A. See, he is the winch driver that I hired in Anchorage.

(Deposition of Gene Southerland.)

"Q. Well, do you remember having seen Fink at [51] No. 4 right after this accident happened?

"A. Yes.

"Q. Fink could run the winches, couldn't he?

"A. Yes, which he did.

"Q. He took over after the accident?

"A. Yes. Well, he was running them—you see, they work hour for hour.

"Q. Now, how many—you say you had seven other winch drivers on board the ship in addition to Bigsley?

"A. Well, there was two winch drivers for every gang that was working. There would be five others besides Bigsley.

"Q. And Fink?

"A. Yes. Let's see. There was—we had two longshore gangs—that would be six winch drivers in all. Of course, the sailors, you couldn't—they stayed at their own gear.

"Q. Well, now, you figure six. Does that include two winch drivers for the sailors' hatch, No. 2, or is it six in addition to the sailors?

"A. No, that includes the sailors. I mean there was two winch drivers for every set of gear. You see, they work hour—you tend hatch for an hour and drive winch an hour." [52]

Mr. Blanpied: Do you wish to interrupt?

The Bailiff: The jury is asking for about five minutes longer.

Mr. Wright: Do you wish to interrupt?

The Court: I think we should interrupt. The

(Deposition of Gene Southerland.)

court has some business in chambers, a matter to take up with counsel in chambers. They said they would be here at 3:00 o'clock. I suggest you consider it a long recess, say, until 3:30.

(Whereupon, a recess was taken.)

Mr. Blanpied: Your Honor, going back to the deposition of Gene Southerland, we were in cross-examination and I will ask the questions:

"Q. Now, were all of those winch drivers that were engaged in this loading before the accident, with the exception of this fellow Bigsley, competent winch drivers, in your opinion?

"A. Well, I had one fellow before Bigsley I got rid of.

"Q. And that was before the accident?

"A. Yes.

"Q. The rest of them seemed to know what they were about?

"A. No, but that is all there was.

"Q. You didn't see the accident, did you? [53]

"A. No, sir.

"Q. You actually don't know what happened down there to cause the accident, do you?

"A. No, just from what I seen afterwards, what I surmised, myself. I mean with using a little intelligence it doesn't take much to see what happened.

"Q. Now, did you look at this strap that had parted in No. 4 when you arrived there after the accident?

"A. Oh, after things had got quieted down and

(Deposition of Gene Southerland.)

they had got blankets and a stretcher and all for Sides.

"Q. It broke, didn't it? The splice didn't pull out. Isn't that correct? A. It broke.

"Q. From your experience with rigging, I take it that you will agree that a properly spliced wire cable will break—assuming that it is in good order—will break before a splice will pull out. Isn't that correct? A. It should.

"Q. The splice is actually stronger than the cable, itself. Isn't that correct?

"A. Well, it couldn't be stronger, but it is just as strong as the cable. [54]

"Q. Was that ¾-inch wire, or was it ⅝, or do you know?

"A. Well, now, I wouldn't say now whether it was ⅝ or what it was, now.

"Q. The Edward A. Filene was a Liberty ship, wasn't she? A. Yes, sir.

"Q. What kind of winches did she have?

"A. Cog winches.

"Q. Steam? A. Yes.

"Q. Did you inspect the winches after the accident to see if they were in good order and condition?"

Mr. Gallagher: Read the answer?

Mr. Wright: Go ahead.

Mr. Gallagher: "I didn't personally inspect them. We started working cargo again as soon as he was out of the hold."

Mr. Wright: "I have no further questions."

(Deposition of Gene Southerland.)

(Whereupon, the parties agreed to waive the signing of the deposition.)

Mr. Gallagher: And the witness also waived signing it.

Mr. Wright: Yes.

Mr. Gallagher: Your Honor, there is something that Mr. [55] Wright and I discussed, and I think we should have told your Honor about it; I am sorry we didn't. It was purely an oversight.

There are certain items of expense which, pursuant to the pretrial stipulation, would be stipulated to upon exhibiting evidence of payment.

Mr. Wright and I have agreed, with reference to those, if your Honor has no objection, we wouldn't go into the exact amount which the libelant would be entitled to recover, in the event your Honor found liability, until such time as the court did reach a preliminary conclusion on the question of liability.

Mr. Wright: Yes.

The Court: That is agreeable.

Mr. Gallagher: There is one item of $14,000.00 that was paid, about which there is no dispute at all, because that is admitted——

Mr. Wright: That is right.

Mr. Gallagher: ——in the pretrial stipulation. It is just the additional amount that makes up some seventeen or eighteen thousand total that we will have to talk about, in the event your Honor holds

as an interlocutory proposition, you might say, there is liability for indemnity.

The Court: After submission, then the court will give you a memorandum on the question of liability, and if you can [56] get together on the other items, as you have on the one, which, of course, was liquidated rather simply, why, you can take care of it in the findings and judgment, if the libelant here wins.

If you can't do it that way, we will just have to reopen for further evidence.

Mr. Gallagher: Mr. Wright, would it be convenient to put Mr. Brunell on the stand now?

Mr. Wright: Yes, I think it would, counsel.

Mr. Gallagher: Mr. Brunell, would you please take the stand?

LEE R. BRUNELL

called as a witness on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gallagher:

Q. Will you state your full name, please?
A. Lee R. Brunell.
Q. What does the initial stand for?
A. "R" is Rod.
Q. Rod? A. Yes.
Q. What is your occupation?
A. Machinery owner. I own the Ace Tractor.

(Testimony of Lee R. Brunell.)

Q. I have a hard time hearing you, Mr. [57] Brunell.

Mr. Wright: I can't hear you, either, Mr. Brunell.

The Witness: Owner of the Ace Tractor & Equipment Co.

Q. (By Mr. Gallagher): The Ace Tractor & Equipment Co. is a corporation, is it not?

A. That is right.

Q. When you say you own it, you mean you own the controlling stock of that corporation?

A. That is right.

Q. How long have you been connected with the Ace Tractor & Equipment Co., a corporation?

A. Twelve years.

Q. Are you the president of the corporation?

A. Yes.

Q. You will have to answer out loud.

A. Yes, sir.

Q. For how long have you been president of that corporation? A. Four years.

Q. Did you bring with you the original of a letter dated December 10, 1949, addressed to Ace Tractor & Equipment Co., signed by Bogle, Bogle & Gates, by Robert V. Holland?

A. No, sir, I didn't.

Q. Well, you got such a letter, didn't you?

A. Yes, I presume it was turned over to the attorney, Mr. Wright, a long time ago. [58]

Q. I will show you what purports to be a copy of the letter I referred to, and which was presented

(Testimony of Lee R. Brunell.)

to me by your counsel, out of his files. Do you remember getting that letter?

Mr. Wright: I will object to that as being irrelevant, incompetent and immaterial.

The Court: I will overrule it as to his getting a letter. I haven't seen the letter.

Mr. Gallagher: You will stipulate they got it, won't you?

Mr. Wright: Well, I can't stipulate that "they," that is, the Ace Tractor & Equipment Co., received the original of that. The copy which you are exhibiting to Mr. Brunell is a carbon copy which was sent to the attorneys Parker, Stanbury & Reese, who previously represented Ace Tractor & Equipment Co. That is where I received that copy.

Mr. Gallagher: Well, the envelope——

Mr. Wright: I would assume, in the ordinary course of business, that such, the original would have been.

The Court: I noticed that letter, or what I think was that letter, in the stipulation you gentlemen had arrived at, and I was wondering the materiality of it to the particular issue we have here.

Mr. Wright: Your Honor, I don't believe that the particular letter which counsel is referring to is the one. The [59] one that is in the pretrial stipulation is a letter to Messrs. Bogle, Bogle & Gates in Seattle, Washington, from Parker, Stanbury & Reese, in which they made a statement, the exact substance of which is contained in the letter which is set forth in the pretrial statement.

(Testimony of Lee R. Brunell.)

This letter which counsel exhibited to Mr. Brunell is only one in a series of letters which, I assume, were sent to Ace Tractor & Equipment Co. by the attorneys for the Olympic Steamship Co. in Seattle, Washington.

Mr. Gallagher: I subpoenaed Mr. Brunell to bring here the original of the letter which was addressed to Ace Tractor & Equipment Co. by Bogle, Bogle & Gates.

This that Mr. Wright has produced I notice is an envelope addressed to Parker, Stanbury & Reese, and is not the letter that I referred to.

The reason I want that letter is this: Certain statements of fact were made in that letter. I want to offer the letter on the theory that it is a statement in writing made to a party to the action, for the purpose of having the court consider those statements of fact made to that party, and the response, if any, which the party made to those statements, in accordance with the general rule that a statement made to or in the presence of a party may be received in evidence in any trial, for the purpose of showing that response was made. If no response is made, it may be accepted as [60] some evidence of the fact that the party to whom the statement is made agreed to it.

The Court: Sort of like an accusatory statement, that if it is not denied it is admitted.

Mr. Gallagher: As for instance, we have a simple automobile accident. John Doe is driving one car and Richard Roe is driving another. John Doe is

(Testimony of Lee R. Brunell.)

hurt and he gets out right afterward and says, "This is all your fault. You were going at 75 miles an hour."

The man to whom the accusation is made turns his back and walks off.

The Court: If it can be shown he heard the statement and walked off in silence——

Mr. Gallagher: That is right.

The Court: ——it is some evidence of an admission of the thing of which he was accused.

Mr. Gallagher: That is the theory on which I want to offer the original letter. If there is any dispute——

First, maybe I had better lay the foundation.

Q. (By Mr. Gallagher): Mr. Brunell, did you get a subpoena which directed you to bring a certain letter with you to this court? A. Yes.

Q. Where is that subpoena?

A. Right here (indicating). [61]

Mr. Wright: I will move to strike the last question, in order to object to the answer of the witness, for the reason I do not believe he is stating the facts correctly. The subpoena was not directed to you, was it, Mr. Brunell?

The Witness: No.

Mr. Wright: Was it?

The Witness: No, sir.

Mr. Wright: As a matter of fact, it was made out to another person, your son, who is now deceased, isn't that right?

The Witness: That is right.

(Testimony of Lee R. Brunell.)

Mr. Wright: You called me and I told you to come, nonetheless, isn't that right?

The Witness: Yes.

Q. (By Mr. Gallagher): Did Mr. Wright tell you to bring the letter, if you could find it?

A. Yes.

Q. Did you look for it? A. Yes.

Q. Have you got it?

A. No. The bookkeeper that we had at the time filed all those volumes of receipts and things, and he is back in Seattle now. But if it is anywheres near there we could dig it up in due time.

Mr. Wright: I am sorry, I can't quite hear you. [62]

The Witness: I am sorry.

The Court: He said if it is available he would dig it up in due time.

Mr. Wright: Your Honor, perhaps I can save a little bit of time. May I address an inquiry to counsel?

Mr. Gallagher, is there any contention on your part that the letter which you asked the decedent Brunell to produce is different than this letter which I have exhibited to you, dated December 10, 1949?

Mr. Gallagher: No, no, but I want to prove that the Ace Tractor & Equipment Co. got the letter at or about the date it bears. I can do it. Of course, I didn't know that this gentleman's son was going to die. I hadn't been informed about that. Somebody accepted the subpoena down there.

(Testimony of Lee R. Brunell.)

Mr. Wright: Well, may I ask, or, address another inquiry to counsel?

Are you aware that the same accusatory statements were made by Messrs. Bogle, Bogle & Gates in a letter addressed to Ace Tractor under date of March 2, 1949, or some six or seven months prior to the letter you are referring to of December, 1949?

Mr. Gallagher: Yes.

Mr. Wright: I have from Messrs. Parker, Stanbury & Reese what purports to be a copy of that, as well as their answering letter to Messrs. Bogle, Bogle & Gates, of May, 1949, [63] and I am agreeable that it may be offered, and I will stipulate it may go in.

Mr. Gallagher: Together with the one of December, 1949?

Mr. Wright: Yes, indeed.

Mr. Gallagher: Are you willing to stipulate the only answer made by anybody for or on behalf of Ace Tractor & Equipment Co. is the copy of the letter which was signed by Parker, Stanbury & Reese?

Mr. Wright: Dated May 20, 1949.

Mr. Gallagher: Yes.

Mr. Wright: I cannot stipulate that is the only letter, counsel. I know it was one. It was the answer to the first accusation. I don't know whether the letter of December 10, 1949, was ever answered or not.

According to the theory on which I understand

(Testimony of Lee R. Brunell.)

you are proceeding, counsel, it would seem that having denied the earlier accusatory letter, it would be rather pointless to continue to reiterate your position.

Mr. Gallagher: That might be true if there was any denial, but there was no denial in the Parker, Stanbury & Reese letter.

Mr. Wright: I will offer it, and it may speak for itself, if you care to put all three of them in.

The Court: The witness has displayed a cooperative intent, to have the bookkeeper in Seattle look through the [64] file and find the letter. We can recess to a later time and receive that.

Mr. Gallagher: I have been informed by Mr. Holland of Bogle, Bogle & Gates that the only letter to which they received any answer whatever, or, the only answer they ever received to any of their letters written to Ace Tractor & Equipment was the letter written by Parker, Stanbury & Reese; that is, the answers to these accusatory statements. That they never did receive any reply directly from Ace Tractor & Equipment Co.

Mr. Wright: I respectfully submit, your Honor, that is the procedure in 99 out of 100 cases in which counsel himself is familiar, when a person is sued, running in someone else, he gets an accusatory letter from some attorney and he turns it over to his own attorney. He doesn't engage in a protracted exchange of letters.

I don't want to be misunderstood, your Honor. I object to the relevancy and competency of these

(Testimony of Lee R. Brunell.)

letters to establish any fault on the part of Ace Tractor.

The Court: Of course, they don't do that, but they might add up to an admission, as Mr. Gallagher says. I don't know. But we will have to look at them and consider the time factors and what went on by way of conversations, and other things that might modify the mere paper record.

The objection as to relevancy is overruled. [65]

Mr. Gallagher: I will offer at this time the letter of March 22, 1949, written by Bogle, Bogle & Gates to Ace Tractor & Equipment Co., and the photostatic copy of a letter written by Parker, Stanbury & Reese, by Raymond G. Stanbury, dated May 20, 1949.

I would also be willing to offer the one of December 10, 1949, if we can have a stipulation that there was no answer to that one.

Mr. Wright: Well, I am sorry, Mr. Gallagher, I can't stipulate because I don't know.

Mr. Gallagher: All right. I would ask your Honor's indulgence then to this extent: I would like to offer this letter of December 10, 1949, with the understanding that I may take the deposition of Mr. Holland in Seattle, for the sole purpose of proving that Ace Tractor & Equipment Co. did not respond at all, either directly or through any attorney, to this letter of December 10, 1949, which I state to your Honor Mr. Holland will so testify.

The Court: We will have the letter marked for

(Testimony of Lee R. Brunell.)

identification. Then if that foundation be provided we will receive it into evidence.

Mr. Gallagher: Very well.

Mr. Wright: Your Honor, I think that this is a case in which the respondent would be entitled, under the province of this court, to have its expenses of counsel in connection [66] with the deposition of Mr. Holland in Seattle.

Mr. Gallagher: We can take it on interrogatories. They won't need any expense.

The Court: Well, it is marked for identification.

Mr. Wright: All right.

The Court: Let's see how it looks in the light of tomorrow morning.

The Clerk: Mr. Gallagher, was this one exhibit or two separate exhibits (indicating)?

Mr. Gallagher: Two separate exhibits.

The Court: The letter of March 22, 1949, Libelant's Exhibit 4. The photostatic copy of the letter of May 20, 1949, is Libelant's Exhibit 5. Those are received in evidence.

(The documents referred to were marked Libelant's Exhibits 4 and 5 and were received in evidence.)

Mr. Gallagher: The March 22nd letter is Libelant's 4?

The Clerk: 4. May 20, 1949, letter is 5.

This one is only for identification (indicating)?

The Court: Yes.

The Clerk: The other two are in evidence?

(Testimony of Lee R. Brunell.)

The Court: Yes.

Mr. Wright: The last one, I believe, your Honor, of December, is for identification.

Mr. Gallagher: Identification. That will be No. 6 for identification. [67]

The Clerk: Yes. The letter of December 10, 1949.

(The document referred to was marked Libelant's Exhibit 6 for identification.)

The Court: The letter of March 22nd is Exhibit 4, is that right?

Mr. Gallagher: That is right, your Honor.

The Clerk: Yes.

The Court: Has that been offered in evidence?

Mr. Gallagher: Yes, your Honor.

The Court: It is not the subject of any stipulation which you have previously made?

Mr. Gallagher: No, sir, your Honor.

The Court: Refresh my memory on the foundation for it.

Mr. Gallagher: Well, we have a foundation here, where Mr. Wright said he would stipulate that that letter was written to Ace Tractor & Equipment Co., and he said that the answer to it was the carbon copy of a letter from Parker, Stanbury & Reese.

The Court: Which is represented hereby the photostat of a letter of May 20, 1949.

Mr. Gallagher: That is right, your Honor.

The Court: Bearing the name of Raymond G. Stanbury.

(Testimony of Lee R. Brunell.)

Mr. Gallagher: Yes. That is the only answer that Ace Tractor made to that letter.

Mr. Wright: Excuse me. I don't want [68] to——

The Court: No matter whether it is the only answer. That is something we have to arrive at after evidence is taken.

Mr. Wright: That is right. I want the court, please, to understand that while I agree with counsel's stipulation, I am, nonetheless, objecting to the relevancy, competency and materiality of introducing those exhibits into evidence.

Mr. Gallagher: I understand that.

The Court: They are admitted. I haven't taken time to figure out whether they add up to enough to make it worthwhile or whether they decide the case, but they are admitted for whatever they are worth.

Q. (By Mr. Gallagher): Mr. Brunell, you have testified that you are the president of the Ace Tractor & Equipment Co.? A. Yes, sir.

Q. And you, as such president, have control over all its correspondence, don't you?

A. Now, yes.

Q. If you have a copy of any letter that was written to anybody you can go to your files and get it, can't you? A. Yes.

Q. Now, have you made a search of your files here in Los Angeles—— A. Yes.

Q. ——for the purpose of finding out whether you have [69] any copies of any letters written di-

(Testimony of Lee R. Brunell.)

rectly to Bogle, Bogle & Gates by your company?

Mr. Wright: I will object to that as being incompetent, irrelevant and immaterial, for the reason the witness has testified he has been president of this corporation for only four years.

I think the instant action in the federal court was filed on December 1, 1950, and at the time of this correspondence, which counsel holds, the witness has testified he was not the president.

Q. (By Mr. Gallagher): In March of 1949, did you have any connection with the Ace Tractor & Equipment Co.? A. Yes.

Q. What was that connection?

A. Vice president.

Q. And as such vice president, did you have access to all the files kept by that company, with reference to its correspondence, in the event you wanted to go and look for some?

A. Yes and no. I weren't here much of that time. Four years I was overseas.

Q. I understand that. But isn't it true that your company makes it a practice to keep copies of all letters it writes? A. Yes. [70]

Q. And those copies of letters actually written, in response to letters your company gets, are kept in regular files, aren't they? A. Yes.

Q. At least now you do have control over all of the files? A. Yes.

Q. Past and up to date, so far as correspondence is concerned? A. That is right.

Q. And you made a search of your files, to see

(Testimony of Lee R. Brunell.)

whether you had any copies of any letters of any kind written to Bogle, Bogle & Gates, with reference to this Sides matter? A. Yes.

Q. You didn't find any copies of any such letters, did you? A. No, sir.

Q. Where is the principal place of business of your company maintained?

Mr. Wright: I will object to that as having been covered in pretrial stipulation.

The Court: Well, we will admit it. If it is covered by a pretrial stipulation it is no more than cumulative, and it might be done for the purpose of orienting the witness to a further line of inquiry. [71]

Mr. Gallagher: That is right, your Honor.

Q. (By Mr. Gallagher): Where is the principal place of business of your company maintained?

A. 5211 East Firestone Boulevard, South Gate.

Q. How long has your company maintained that principal place of business, over ten years?

A. No.

Q. Over five years?

A. Just about four years.

Q. About four years? A. At that location.

Q. Where did it maintain its principal place of business before that?

A. Firestone and Alameda Streets.

Q. For how long had it maintained its principal place of business at the last mentioned address?

A. About four years.

Q. So that for at least eight years immediately

(Testimony of Lee R. Brunell.)

last past your corporation has maintained its principal place of business in the County of Los Angeles, State of California? A. That is right.

Q. And has it during all that time maintained its records pertaining to the conduct of its business and consisting, among other things, of letters and copies of letters which it has written to other people? [72] A. Yes, sir.

Q. In this county? A. In this county.

Q. And it was in this county that you made your search among your records for copies of correspondence that might have gone out from your company to Bogle, Bogle & Gates?

A. Yes, it is, of what we got available.

Q. Now, Mr. Brunell, did you make an examination of the records of your company for the purpose of finding out whether your company ever made any returns to the Internal Revenue Department of the United States with reference to Social Security taxes or old age benefits, or withholding, so far as income taxes are concerned, in connection with Calvin H. Sides, the man who was injured in this accident we are talking about here?

Is that question too involved for you?

A. Yes and no.

Q. I will break it up for you. Your company makes Social Security tax returns with reference to all its employees, doesn't it?

A. That is right.

Q. And you also make old age unemployment

(Testimony of Lee R. Brunell.)

benefit returns with reference to all of your employees? A. Yes, sir.

Q. And you also withhold a portion of the earnings of [73] each of your employees, pursuant to the Internal Revenue Act, don't you?

A. Yes, sir.

Q. And your company has done that ever since those laws have been in effect? A. Yes, sir.

Q. Did you make a search of your files or records, to find out whether you had ever made any such returns with reference to Calvin H. Sides?

A. No, sir.

Q. You mean you didn't make any such returns?

A. Not particular to this case. Those books have been closed on that Alaskan deal for five years, four years.

Q. You didn't make any returns of that kind, with reference to Calvin H. Sides, did you?

A. I don't know.

Mr. Gallagher: That is all.

Cross-Examination

By Mr. Wright:

Q. Mr. Brunell, after the Edward A. Filene had brought its cargo back to the West Coast port, the Olympic Steamship Co., Inc., billed Ace Tractor & Equipment Co. some eight thousand-odd dollars for crew overtime, in connection with the loading operations at Amchitka, did it not? A. Yes. [74]

Mr. Gallagher: That is objected to on two grounds. One, it is not proper cross-examination.

(Testimony of Lee R. Brunell.)

And secondly, the document would be the best evidence of what was contained in the billing.

Mr. Wright: All right.

The Court: Well, I will treat it as a preliminary question. Whether they billed them isn't going to be considered as firmly established unless we see the bill.

Mr. Wright: I have no objection to the introduction of the documents themselves.

The Court: Mr. Wright is apparently seeking out the document.

Q. (By Mr. Wright): Mr. Brunell, I show you a letter which purports to be signed by R. L. Brunnell, addressed to my office, Lillick, Geary & McHose, dated January 16, 1952.

I ask you if you recognize the signature that appears on that letter.

A. Yes, sir, very well.

Q. Whose signature is that? A. My son.

Q. Is he presently living?

A. No, deceased last Sunday, a week ago Sunday.

Mr. Wright: I will offer this in evidence.

Mr. Gallagher: What, the letter?

Mr. Wright: The letter and the enclosed canceled check—— [75]

Mr. Gallagher: I object——

Mr. Wright: ——which is dated July 9, 1948, payable to the order of Olympic Steamship Co., in the sum of $8,007.81.

Mr. Gallagher: I object to the letter on the

(Testimony of Lee R. Brunell.)

ground it isn't competent evidence. It isn't binding on the libelant.

The Court: On the ground it is self-serving?

Mr. Gallagher: Yes, it is.

Mr. Wright: Your Honor can read it.

The Court: Well, if I read it, it gets into my consciousness.

Mr. Gallagher: You are going to have to see it, in order to decide whether it states a conclusion and opinion.

I have no objection to any part of the letter, except the words "for crew cargo overtime as invoiced to us" upon the ground that that part of the letter states a conclusion, and it is a conclusion based upon another document referred to in the conclusion, to wit, an invoice.

The Court: Well, that objection leads me to see a possibility that it will take more than the immediately offered document to prove what Mr. Wright has in mind.

Mr. Gallagher: It would.

The Court: And since we don't admit evidence by the bale, but rather by straws, we will let these particular [76] straws come in. They will be marked as next in order.

The Clerk: Respondent's Exhibit A for identification.

(The document referred to was marked Respondent's Exhibit A for identification.)

(Testimony of Lee R. Brunell.)

The Court: If we need to get some others in to complement them, we will hear those offers at the time.

Mr. Wright: Please the court, I don't want to appear petulant here, but I am frankly at a loss to understand the purport of counsel's objection. Does he seriously question we were billed and paid for crew overtime?

The Court: He is just objecting to your concluding which bill it was you paid.

Mr. Wright: Well then, I understand the ruling of the court is that we should find the invoice from——

The Court: The ruling of the court is that this particular letter and check are admitted into evidence.

(The document heretofore marked Respondent's Exhibit A was received in evidence.)

The Court: If Mr. Gallagher can show that they are not sufficient to prove what they are offered for, why, that is another thing. You examine them. You might think there is something in what Mr. Gallagher has said, and decide to supplement them by further documentation. That is a question for the lawyers trying the case, not for the one hearing it.

Mr. Wright: I have no further questions of this witness. [77]

Mr. Gallagher: I have none, either. Thank you.

(Witness excused.)

The Court: Now, do you wish to proceed further in this, or, since Mr. Resner has come in, do you want to take up the Klubnik matter, which the clerk told me is set for this afternoon?

Mr. Gallagher: Yes, your Honor. I don't know how long your Honor wants to stay here.

The Court: We will take that up now. Do you want to present anything further on the case on trial today?

Mr. Gallagher: I don't think so. We have another deposition, your Honor.

The Court: You would rather not break the continuity?

Mr. Gallagher: That is right.

The Court: All right. We will stand in recess then until tomorrow morning at 9:45.

(Whereupon, at 4:30 o'clock p.m., Tuesday, January 12, 1954, an adjournment was taken until Wednesday, January 13, 1954, at 9:45 o'clock a.m.) [78]

Wednesday, January 13, 1954, 11:05 A.M.

The Court: All right, gentlemen.

Mr. Gallagher: We want to offer the deposition of Gerald J. Reilly. Or, did we start it?

The Court: I think you were about to start it, but had not actually done so. At least, if you did you didn't get far enough into it——

Mr. Gallagher: I don't think we read any of it.

Mr. Wright: Your Honor, while we are getting that out, by stipulation of counsel, respondent will

offer into evidence the Charter Party covering the voyage of Edward A. Filene, which is a photostatic copy thereof, together with a letter of supplemental agreement, dated June 4, 1948, which is attached, which concerns the strike clause.

Mr. Gallagher: It is all right.

The Court: You are offering that on behalf of respondent?

Mr. Wright: Yes.

The Court: It will be received.

Mr. Wright: Also, your Honor, we last night located the invoices which were in support of the check which I offered last night, and counsel has very kindly offered to stipulate these invoices may go in covering the crew cargo overtime.

Mr. Gallagher: Three sheets. [80]

Mr. Wright: Yes, three sheets, all of which are dated July 8, 1948, and are addressed to Ace Tractor & Equipment Co.

The Clerk: As one exhibit?

Mr. Wright: I think one exhibit, yes.

The Court: They will be received as Respondent's second in order.

The Clerk: The Charter Party is Respondent's B. The letters would be C.

(The documents referred to were marked Respondent's Exhibits B and C and were received in evidence.)

Mr. Blanpied: Do you want to read the questions or the answers?

Mr. Gallagher: I would rather read the answers.

(Whereupon, the questions were read by Mr. Blanpied and the answers by Mr. Gallagher, of the deposition of Gerald J. Reilly:)

DEPOSITION OF GERALD J. REILLY

Mr. Blanpied: This is the direct examination of Gerald J. Reilly, being questioned by Mr. Gallagher:

"Q. Will you state your name, please?
"A. Gerald J. Reilly.
"Q. What is your occupation?
"A. Captain of the Harry Lundeberg.
"Q. You are a Master Mariner?
"A. Yes, sir.
"Q. How long have you been a Master Mariner?
"A. Let's see, nine years.
"Q. Where do you live, Captain?
"A. 5361 El Jardin.
"Q. Are you at the present time the Master of the SS Harry Lundeberg?
"A. That's right.
"Q. Is that ship scheduled to sail from this port today? A. Yes.
"Q. At what time? A. Midnight.
"Q. When do you next expect to be in Southern California, some port in Southern California?
"A. What is today?
"Q. Today is the 8th of January.
"A. About the 19th or 20th.
"Q. About the 19th or 20th? A. Yes.
"Q. When you leave this port where do you go?
"A. San Marcos, Mexico.

(Deposition of Gerald J. Reilly.)

"Q. So you will be away from the State of California for at least——

"A. Well, about 12 days.

"Q. 12 days? [82]

"A. Yes, then when we come north I will only be in here for 10 hours.

"Q. You will not be in the State of California on next Tuesday or anytime next week?"

Mr. Gallagher: That wasn't answered.

Mr. Blanpied: "Q. Well, you are sailing tonight for San Marcos, Mexico? A. Yes.

"Q. How long does it take to get there?

"A. Oh, about four days dock to dock.

"Q. How long do you stay there?

"A. About a day and a half.

"Q. Then you come back here?

"A. We will be back and it takes about four days and a half or five days.

"Q. Captain, were you Master of the SS Edward A. Filene in June of 1948? A. Yes.

"Q. Was Calvin Sides a member of the crew of that vessel? A. Yes.

"Q. Was that vessel in Alaska during that month? A. During that——

"Q. During June of 1948? [83] A. Yes.

"Q. During the time that the vessel was there was there any loading of landing mats going on?

"A. Yes.

"Q. Now, did Calvin Sides sign any Articles for the voyage and for his service aboard that vessel?

(Deposition of Gerald J. Reilly.)

"A. He signed on at San Francisco as I recall.

"Q. For how long was he employed pursuant to those Articles?

"A. Do you mean for that one voyage?

"Q. Yes, what was the voyage for which he was employed?

"A. From San Francisco to Alaska and back to the West Coast port.

"Q. Did he at any time sign off the Articles?

"A. Not that I know of, because he was in the hospital.

"Q. Yes, I understand that, but up to the time that he was injured in Hold No. 4 he had not signed off the Articles? A. No.

"Q. In the loading of these landing mats were any plow wire straps used? A. Yes.

"Q. Do you recall the dimensions of the [84] plow wire straps?

"A. Well, it all depended on what you were loading.

"Q. For these landing mats, for one load.

"A. It is normally 5/8 you use.

"Q. What, according to your recollection, was the actual size of the plow wire strap being used at the time Mr. Sides was injured?"

Mr. Gallagher: That wasn't answered.

Mr. Blanpied: "Q. Did you know that Calvin Sides was injured? A. Well, sure.

"Q. In what hold was he injured?

"A. No. 4.

(Deposition of Gerald J. Reilly.)

"Q. Did you go into No. 4 hold after he was injured? A. Yes, sir.

"Q. Was he still in there?

"A. He was still down in the hold.

"Q. Was anything on top of him at that time?

"A. I think they had already gotten it out of there when I got down there. They had already lifted it up.

"Q. When you got down there was there any plow steel wire in the hold? [85]

"A. Winch falls and straps.

"Q. Was there any plow steel wire strap which had broken in that hold? A. Yes.

"Q. Did you see that strap?

"A. Yes. Do you mean the one they were using?

"Q. Yes. A. Yes.

"Q. The one they had been using while manipulating this one load? A. Yes."

Mr. Wright: At that point I objected as calling for a conclusion of the witness, on the ground he testified that he was not down there at the time of the injury.

The Court: Well, there isn't any testimony that would qualify an answer, is there, Mr. Gallagher?

Mr. Gallagher: We stipulated in the pretrial stipulation that a plow steel wire strap, which was used in pulling this one particular load in, had broken and, therefore, there is a foundation by stipulation in the record that they were using the steel strap which broke.

Mr. Wright: I respectfully submit that that

(Deposition of Gerald J. Reilly.)

doesn't go so far as to show that this witness had any knowledge as to which one is broken, because——

The Court: I think that is right. The objection is [86] sustained, not as to the subject matter, but as to the knowledge of this particular witness. There isn't any foundation showing he would be in a position to know.

Mr. Gallagher: Then I assume, to keep the record straight, that your Honor will strike from the record the question and answer which have been read, "The one they had been using while manipulating this one load?" and the answer, "Yes"?

The Court: Yes. And on the original deposition, will you circle that part and write the word "stricken" opposite, so in reading it I will have that brought to my attention and memory.

Mr. Blanpied: Yes, sir.

"Q. Did you see a plow steel wire strap which had broken? A. Yes.

"Q. Was there more than one broken plow steel wire strap in that hold at that time?

"A. Only the one at that time.

"Q. What was the size of that plow steel wire strap? A. That was a 5/8 strap.

"Q. Do you know the breaking point of that type of strap; just answer 'Yes' or 'No'?

"A. Yes. [87]

"Q. What is the breaking point of that type wire strap if the strap is in good condition?

"A. It is around 14 or 15 ton.

(Deposition of Gerald J. Reilly.)

"Q. Are you also familiar with the safe working load of that particular type of wire strap?

"A. Yes.

"Q. What is the safe working load of that particular type of plow steel wire strap if it is in good condition?

"A. About three tons. It is about a fifth of your breaking strain.

"Q. Now, were you familiar with the ship's gear and equipment aboard that ship?

"A. What do you mean by that?

"Q. Well, did you have personal knowledge of what part of the ship's gear was being used in the loading of these——

"A. Do you mean booms and winch falls and——

"Q. Yes.

"A. They were all in good shape."

Mr. Wright: At that point I moved to strike the answer as not being responsive.

The Court: Well, that is rather technical. I will consider that it is kind of likely responsive. The objection is overruled, or, the motion to strike denied. [88]

Mr. Blanpied: "Q. What I am trying to find out is this: Do you know who owned the cargo gear consisting of the winches and booms and the falls?

"A. Yes.

"Q. Who owned those? A. The ship.

"Q. Did you know who owned the plow steel wire straps that were being used in the loading of

(Deposition of Gerald J. Reilly.)

Hatch No. 4? A. Yes.

"Q. Who owned those plow steel wire straps?

"A. All that gear, all the stevedoring gear was brought on the ship by Ace Tractor.

"Q. Would that include all of these steel wire straps?

"A. All the steel wire straps, spreaders, and bridles, all that was all their gear.

"Q. Was this particular strap that you observed and which had broken a part of the Ace Tractor Company gear?

"A. Yes, we didn't have any stevedoring gear at all on the ship.

"Q. Now, Captain, have you had experience in operating winches yourself? A. Yes. [89]

"Q. Have you had such experience before this accident in which Mr. Sides was involved?

"A. Yes.

"Q. Did you actually observe the winch driver named Bigsby or Bigby operating the winch which was involved in Mr. Sides' accident at any time before the accident?

"A. Well, I saw him there.

"Q. Did he appear to you to be an incompetent winch driver or did he do anything that indicated to you that he was incompetent?

"A. Usually the way you tell is when they break down your gear.

"Q. So you didn't see him break any of your gear? A. No.

(Deposition of Gerald J. Reilly.)

"Q. Nothing broke until the time of this accident? A. That's right.

"Q. Now, did this particular plow steel wire strap which had broken appear to you to be new or old?

"A. Well, it had been used but it was a fairly new strap. An old strap would be rusty or you could tell they had been used. They get kinky. [90]

"Q. If a plow steel wire strap of the kind which broke was in good condition and adequate for the purpose for which it is intended, would it stand a load of 2,200 pounds without any trouble?

"A. Sure."

Mr. Wright: At that point I moved to strike the answer on the grounds that it called for a conclusion of the witness and no proper foundation having been laid for it. No proper foundation had been laid for the expression of an expert opinion called for, nor had there been any foundation showing that the witness knew the manner exactly that this gear was rigged at the time of the casualty.

The Court: I do not recall any foundation which would qualify the man to give an expert opinion. Is there such, Mr. Gallagher?

Mr. Gallagher: I think there is later on, where he testified that he had been a winch driver himself for quite a long time. Isn't that true?

Mr. Wright: I don't believe that he testified how long he had been a winch driver. I believe that that testimony came from the other witness, whose depo-

(Deposition of Gerald J. Reilly.)

sition we read yesterday, if I recall the deposition. I don't think this is too important, anyhow.

The Court: All right. We will strike it out for lack of foundation and will entertain a motion, in the course of [91] trial, if it later appears that the witness was qualified to express the opinion which has been asked for.

Mr. Blanpied: I will circle that one, your Honor.

The Court: Thank you. I think the same evidence is already in the record, anyhow.

Mr. Gallagher: Line 14, page 11.

Mr. Blanpied: "Q. Prior to the time this accident happened——

"A. What he said there, what do you mean that I didn't know how it was rigged?

"Q. Did you know how it was rigged in Hold No. 4?

"A. Sure, they had been taking that stuff aboard for a couple of days.

"Q. Do you know how it was rigged?

"A. Sure.

"Q. Will you tell us how it was rigged in Hold No. 4? A. Rolled"——

That should be "Roved," shouldn't it?

Mr. Wright: Yes, I think so; r-o-v-e-d.

The Court: It should be what?

Mr. Gallagher: Roved—r-o-v-e-d—which I think we can stipulate means, insofar as the witness' vocabulary is concerned, that this wire strap was inserted into a hole [92] in a portion of the structure of the shijp. Like you take a piece of string

(Deposition of Gerald J. Reilly.)

and run it through a hole and then pull on it you have the bight of the string in this hole.

The Court: Is that a technical term, which is generally used in that sense?

Mr. Gallagher: Yes, your Honor.

The Court: Thank you.

Mr. Gallagher: Isn't that correct, Mr. Wright?

Mr. Wright: That is right. Sometimes it is used interchangeably with thread. If you rove it, you thread it. It was roved.

You had better change that "rolled" to "roved" at line 4, page 12, also.

Mr. Gallagher: Yes.

"It was roved through a limber hole in the frame and then they put the snatch block in the two eyes and moused it. Then you reeve your winch fall into that."

Mr. Blanpied: "Q. Did you see it rigged in that fashion before this accident happened?

"A. Sure, they had been working a couple of days on that gear.

"Mr. Gallagher: I think that's all."

Mr. Gallagher: Cross-examination now.

Mr. Wright: Do you want to read it, Mr. [93] Gallagher?

Mr. Gallagher: I would just as soon do it.

Cross-Examination

Mr. Wright: "Q. Now, Captain Reilly, you have been discussing this case with Mr. Gallagher before I came in, haven't you? A. Yes.

(Deposition of Gerald J. Reilly.)

"Q. Did Mr. Gallagher show you any statements which you previously made or signed concerning this accident? A. No.

"Q. All you have is what——

"A. What he was telling me about this thing.

"Q. Did Mr. Gallagher read something to you?

"A. Well, it is about"——

Mr. Gallagher: Then I said, "This stipulation," referring to the pre-trial stipulation which I had in my hand.

"About who is responsible" is the witness.

Mr. Wright: The last statement is from the witness.

Mr. Gallagher: Yes.

Mr. Wright: "Q. Mr. Gallagher told you who was responsible?

"A. No, no, the thing was, who was responsible as far as the equipment and what was in the charter party.

"Q. Mr. Gallagher then told you whose strap this was; right? [94]

"A. No, he didn't tell me whose strap it was. I know whose strap it was.

"Q. All right. Now, Mr. Reilly, the ship had straps, 5/8-inch wire straps identical to the one which you observed broken in No. 4 hatch, didn't it?

"A. No.

"Q. If I were to tell you that the Chief Officer, Mr. Burgstrom, and you are familiar with him, testified that the ship did have a number of straps identical to the one which we believe was broken

(Deposition of Gerald J. Reilly.)

in No. 4 hatch, would that change your testimony?

"A. No. You said that the ship had straps in No. 4 hatch. Our straps would be in the forepeak or afterpeak locker.

"Q. Well, perhaps I didn't make myself clear. It is true, is it not, Captain Reilly, that the ship did have on board wire setups which were similar in appearance and design to the one which you observed broken in No. 4?

"A. Right, aboard the vessel, but not in use.

"Q. Well, were you in No. 4 hold at the time the cargo was being worked?

"A. How could I do that?

"Q. You weren't, were you? A. No. [95]

"Q. You did inspect No. 4 as well as the other hatches from time to time in the course of your duties, didn't you? A. That's right.

"Q. You observed how they were carrying out operations?

"A. How they were loading?

"Q. Yes. A. Yes.

"Q. Now, in addition to your carrying out that duty of inspection, the Chief Officer, Mr. Burgstrom, also did it, didn't he? A. That's right.

"Q. Captain, you actually didn't see the way that the runners were located with relation to the strap which you state was broken in No. 4 at the time of the accident, did you?

"A. Do you mean right at that moment when it happened?

(Deposition of Gerald J. Reilly.)

"Q. Yes.

"A. Well, unless they had changed it. You see, what they had been doing, they would bring in, say, eight or ten loads of two at a time and then they would rig up out in the wings and heave them back out in the wings. [96]

"Q. In other words, it was an operation which required a frequent change of the position of this sling, didn't it?

"A. Well, no. You just change from bringing the loads into the hold with your bridle, then you drop all in the square, and then they take and put the winch fall—your yardarm fall would go into this block, and you would lift it up, see, and then you would set it in. You slack away on your midships.

"Q. Well, then is it a fair statement to say that after a number of loads were landed in the square of the hatch it then became necessary to unhook one of the runners, either the port or the starboard, and from the blacksmith——

"A. No, no, you leave it in the blacksmith. You just took the bit and put it in the snatch block.

"Q. It is the same thing, you could unhook from the blacksmith and reeve it through the snatch block, but you say they merely opened the snatch block which was secured to the sling and put the runner in when they wanted to float it into the wings; right?

"A. You use the same bridles. You don't discon-

(Deposition of Gerald J. Reilly.)

nect anything, take the bit of the wire and put it in the snatch block. [97]

"Q. Yes, well, now, that would entail moving the runner, we'll say, a distance of perhaps 10, 15 or 20 feet to the wings where you could open the snatch block, put it in and then secure your snatch block again and then knot her in; right?

"A. Right.

"Q. Now, in addition to the operation of loading it required the position of the sling which was holding the snatch block to be moved from time to time, didn't it? A. No.

"Q. In other words, you could load the entire hatch by keeping the snatch block in the same position?

"A. Two straps, there are two straps. One over in the aft end and another strap in the midships there. Those No. 4 hatches have a deep tank in the lower hold which gives you—you don't have the full length of the hatch because you have a deep tank at the fore end so all it entailed was the movement of that twice. You load the aft end first and then you start in the midships.

"Q. Well, now, that would permit you to drop the load under the square of the hatch in the place where the sling and block were, isn't that right? [98]

"A. Well, you dropped the load in the square of the hatch.

"Q. Yes——

"A. And when you wanted to float it in to the wing——

(Deposition of Gerald J. Reilly.)

"Q. And it is your testimony then that the forward and the after slings were never moved during this entire operation; is that your testimony?

"A. I don't think so. I wouldn't be positive due to the fact I wasn't down in the hold all the time.

"Q. It is possible they might have changed the position of the sling and moved to another limber hole? A. It is possible.

"Q. If I were to tell you one of the witnesses for the Olympic Steamship Company has already testified in substance to that effect would that change your answer?"

That question was not answered.

Mr. Gallagher: "What was the question?"

Mr. Wright: "Mr. Reporter, will you read the last couple of questions and answers?

"(The record was read by the reporter.)

"Q. Well, then it is possible that this strap [99] was moved from place to place in the hold?

"A. Yes, it would be just on the one side. It would be just on the one side because the shaft alley is in between and they take so many loads on the one side and take so many loads on the other side, four men working on each side.

"Q. Now, Captain, this limber hold that you have described or spoken of, can you tell us what that is or what it looks like?

"A. Well, I can draw a picture of it. That is the side of the ship and this, it is a stiffening plate in there, a hole in there, evidently if there is any

(Deposition of Gerald J. Reilly.)

strain in there—cut a hole to keep it from going further if there is a break or anything, they have the hole in there. I really couldn't tell you the technical reason but it is an understood fact it is there so if anything would break it wouldn't go any further due to the fact that you have the hole in there.

"Q. Let's see, a limber hole is a hole I take it about three or four inches in diameter?

"A. Yes, about that.

"Q. Which is cut in a steel plate which forms one of the vertical members of the ship's structure; isn't that about it? [100] A. Yes.

"Q. Now, the strap is roved through that; isn't that right? A. Yes.

"Q. Now, through use the strap will come in contact with the edge of that limber hole, won't it?

"A. That's right.

"Q. And that edge is about a quarter of an inch across, isn't it?

"A. Well, it all depends on what size the plate is.

"Q. Do you recall, on the Edward A. Filene, what the size of the plates were where these limber holes were?

"A. Well, it is a standard Liberty ship but I couldn't tell you what the size of the plating is. Maybe 3/8 or 1/2.

"Q. Or 1/2-inch?

"A. I would say it was a half or maybe a little greater due to the fact that is holding up your tween decks, there, see.

(Deposition of Gerald J. Reilly.)

"Q. Yes, and that presents a rather sharp surface to anything which is pressing or pulling against the circumference of the limber hole, doesn't [101] it? A. Yes.

"Q. Now, what was the size of the runners which were being used in the gear in No. 4?

"A. 5/8, 619.

"Q. It is sometimes the practice, isn't it, Captain, when you have used a runner for some length of time to replace it and to use the old runner for making straps?

"A. Well, it isn't too prevalent any more except on the steam schooners.

"Q. Well, the Edward A. Filene was in effect on the steam schooner trade, wasn't it?

"A. No, we were strictly from hunger because none of the fellows had ever been up there before except myself and the Second Mate.

"Q. All right. Now, in addition to Mr. Sides in No. 4 there were other members of the crew working there in that hatch, weren't there, at the time of the accident? A. Yes.

"Q. Do you recall how many there were, Captain? A. Eight.

"Q. How long before this accident had you commenced any cargo loading in No. 4?

"A. Well, I think that we used to start at [102] 7:00 o'clock and we worked until either 11:00 or 12:00. I think it was 11:00 o'clock.

"Q. I mean, is it correct that the loading oper-

(Deposition of Gerald J. Reilly.)

ations in No. 4 had been going on three days before this accident happened?

"A. Oh—got in there on a Sunday. What day was it on? We got in on a Sunday up in Amchitka —what day was it the accident happened?

"Q. Well, I don't know, Captain. Do you have any recollection as to about how many days you had been loading cargo in No. 4 before this casualty happened?

"A. A couple of days due to the fact we hadn't gotten—it wasn't over that because we hadn't gotten over the top of the shaft alley yet.

"Q. Now, Captain, you told us that the strap which you observed to be broken down in No. 4 was the equipment belonging to Ace Tractor?

"A. All the stevedore equipment was brought on. We didn't have any actual stevedoring equipment. We did have, like you said, there was wire straps on the ship, but they weren't used in the actual stevedoring operation. Those straps were for our own use on the ship like, say, you had to overhaul a lifeboat or something. [103]

"Q. Yes, but it is a fair statement to say, isn't it, that it is possible that that strap which you observed broken down there might have been the ship's strap?

"A. I don't know how it could have been unless they went in the lockers and took it out of there.

"Q. It is possible, isn't it, Captain?

"A. Well, I guess it is, but it wasn't supposed to be—it wasn't supposed to be used because all

(Deposition of Gerald J. Reilly.)

the stevedoring equipment was supposed to be brought aboard by Ace Tractor.

"Q. Is it a fair statement to say that when you tell us that the strap which you observed broken down there in No. 4 hatch belonged to Ace Tractor, that you make that statement on the basis of what should have been the case?

"A. That's right, I'd say that.

"Q. Now, Captain, were you paid any overtime for your services in connection with loading cargo?

"A. No, no.

"Q. You got no remuneration whatsoever?

"A. I got some money from them but I didn't get any overtime from them.

"Q. Tell us what you got for attending to [104] and assisting in the cargo loading operation at Amchitka?

"A. I don't recall, around $200.

"Q. In other words, you received an additional compensation over and above what the Olympic Steamship Company was obliged to pay you as Master for doing this work in connection with the cargo? A. That's right.

"Q. Captain, as far as the crew of the Edward A. Filene was concerned, Chief Officer Burgstrom kept a record, did he not, of the overtime which each man worked?

"A. Well, that is the reason I got the two hundred bucks. I was doing most of the paper work so he could use those guys to work cargo.

"Q. Well, if I were to tell you that Chief Officer

(Deposition of Gerald J. Reilly.)

Burgstrom has stated that he was the one who kept track of the seamen's overtime, you would say that that is not true?"

Mr. Gallagher: I objected to that at the time and I objected on the grounds that "there is no evidence that Burgstrom ever made any such statement and it wouldn't be binding on the Captain if he did. That is purely surmise and conjecture."

The Court: I think it might be open to a [105] lot of critical view, but it is admissible, so I will overrule your objection.

Mr. Gallagher: "Well, he possibly was taking care of the deck, but we also had a steward's department, the black gang, and the purser, they were all working."

Mr. Wright: "Q. Well, in any event, the Chief Operator did participate to some extent in keeping track of the overtime of the crew in connection with loading cargo at Amchitka, didn't he?

"A. That's right."

Mr. Wright: "I have no further questions."

Mr. Gallagher: Redirect examination.

Mr. Wright: Do you want me to read yours?

Mr. Gallagher: Please.

Redirect Examination

Mr. Wright: "By Mr. Gallagher:

"Q. Captain, you say that the ship did have some plow steel wire straps approximately 5/8 inches in diameter in the forepeak and some other place?

(Deposition of Gerald J. Reilly.)

"A. In the afterpeak. Well, any ship has had some straps.

"Q. But those straps you say were not to be used by the stevedore?

"A. Well, usually you keep all your gear rooms locked up when you come in because of the fact people do go around stealing your equipment. [106]

"Q. Well, if these people, that is, the Ace Tractor Company people, got a strap which belonged to the ship was that obtained with your consent or permission? A. No.

"Q. And in order to get a strap of that type which actually belonged to the ship would they in effect have to steal it?"

That wasn't answered.

Mr. Wright: "Q. Well, did you give Ace Tractor Company any permission at any time to use any strap belonging to the ship? A. No.

"Q. You did see this strap which broke down in Hold No. 4? A. Yes, after the accident.

"Q. And from your observation of that strap in the hold can you tell us whether it was or was not part of the ship's equipment?

"A. Well, there wasn't any actual markings on the straps, you know. Our straps weren't marked. Neither was theirs.

"Q. Well, when you said that the basis of your statement that this broken strap was a strap which belonged to the Ace Tractor Company, which was what [107] should have been the case, what did you mean by that?"

(Deposition of Gerald J. Reilly.)

Mr. Wright: At that point I objected on the ground it was an attempt to impeach his own witness, and objected to the form of the question as calling for a conclusion of the witness.

The Court: Do you have anything to justify the question?

Mr. Gallagher: Well, I think the witness is entitled to explain what he meant by the statement, which he made on cross-examination.

The Court: Then you treat this as a question calling for clarification?

Mr. Gallagher: Not impeachment.

The Court: Objection overruled.

Mr. Gallagher: "A. All the stevedoring equipment that was to be used, and according to the contract, was to be furnished by Ace Tractor Company. The only thing according to the charter party was that we would—our gear would handle five tons, and if I am not mistaken, the jumbo gear was supposed to be for 25 tons. In fact, there was a couple of wires to the effect that there wasn't anything in the charter party originally about it and I wired Seattle about using the jumbo gear.

"Q. Well, did you see Ace Tractor Company equipment being brought aboard the vessel for use in the loading operations? [108] A. Yes.

"Q. Did that equipment include straps which were brought from the dock? A. That's right.

"Q. That is, these particular plow steel wire straps, 5/8 of an inch in diameter?

"A. Yes, the particular type of straps.

(Deposition of Gerald J. Reilly.)

"Q. Yes, the particular type of straps that were being used in Hold No. 4?

"A. Yes, they are in various lengths.

"Q. Well, regardless of their length, was this strap which broke and which you observed in a broken condition in Hold No. 4 a strap of the kind that was brought aboard by Ace Tractor?

"A. Would you give me that again?

"Mr. Gallagher: Mr. Reporter, will you read the question?

"(The pending question was read by the reporter.)"

Mr. Gallagher: "I would say 'yes.'"

Mr. Wright: "Q. Did any person purporting to represent Ace Tractor ask you for permission to use any of the ship's equipment excepting the winches and the cargo falls and booms?

"A. Not to my recollection, no.

"Q. Did you discuss the breaking of this [109] strap with Mr. Dean of Ace Tractor Company or anybody else representing Ace Tractor Company?

"A. Gee, I don't recall him having anything to come aboard about. He may have, but I don't recall it. Our deals were mostly where I wanted the different objects of the cargo.

"I think that's all."

Further recross-examination by Mr. Wright.

"Q. Captain Reilly, you didn't personally issue every piece of rope or strap that was used on board the Edward A. Filene, did you? A. No.

(Deposition of Gerald J. Reilly.)

"Q. As a matter of fact, the boatswain, the Chief Mate, any of the officers could have gotten any of the gear out of either the locker in the forepeak or the afterpeak without checking with you or asking your permission? A. That's right.

"Q. Captain, you actually relieved the winchmen during various times of this unloading job?

"A. Once in a while.

"Q. Up at Amchitka? A. Yes.

"Q. And operated the winches during the relief periods? [110] A. Yes.

"I have no further questions."

Whereupon, the parties stipulated that the signature might be waived.

The Court: With respect to the deposition just completed and the deposition which was received into evidence, we have the situation of those depositions having been read into the record, so our reporter has a stenographic record of them.

Then you have the depositions which, I take it, that the offer of reading them in was an offer into evidence and have treated it that way. And I think one of them is actually marked into evidence.

But you have had motions with respect to the striking of some of the testimony. Some of those motions were successful and some were not. And there were objections.

Thinking of the cost of appeal, someone might want to appeal this. If you gentlemen wish to, you may take the original depositions and indicate the rulings that have been made on them by interlining

the part that is stricken or objected out, and putting a marginal notation to that effect, and if you can agree on what it is we will accept your alteration of the original exhibits to that extent, so that you might, if you have to appeal, not be burdened with the cost of obtaining a transcript, unless you wish to. [111]

Mr. Wright: I personally wish to thank the court for that, but it occurs to me that in the event an appeal may be or should be taken in this case by either party, that unless the entire transcript were printed up, so that the various judges could read it, I am afraid it would be a little difficult for them to decide simply on the basis of the one copy of the deposition.

The Court: You mean the validity of the objections made might be in question on the appeal, and hence they have to have before them what was said and done at the time the motions to strike or the objections to receive were under consideration?

Mr. Wright: Yes, your Honor. I am inclined to think that.

Mr. Gallagher: I think the only deposition, where any rulings were reserved, was during the deposition of Southerland, and counsel did mark on the original of the depositions each place where the court sustained an objection, and marked these places where your Honor has reserved a ruling.

I think we could go through those now, if your Honor could have the original of the Southerland deposition. Then you could make marks that are intelligible to your Honor.

The Court: It is not going to be so important here, as to have them intelligible to a reviewer of our ultimate decision. [112]

Mr. Wright: Yes, your Honor. The respondent has no objection to the court taking these two depositions and reading and using them for any purpose necessary to arrive at the decision in the lower court here.

My only thought here is that I think if the matter goes up on appeal, either Mr. Gallagher or myself will want the transcript, the testimony as read and the objections and rulings that were made.

The Court: That, of course, would be the right of anyone resisting an appeal, to have it taken in the way in which the court hears it here.

There might conceivably be a misreading, an inadvertence of some kind, which would have given the court a different impression. We come across that on appeals on instructions.

The Appellate Court always wants the reporter's transcript of what the instructions were, as given, rather than the instructions as typed up in advance and read. We might have missed a line or interpolated something.

What is next?

Mr. Gallagher: That is all, your Honor.

The Court: You rest?

Mr. Gallagher: Yes, your Honor.

Mr. Wright: The defendant, or respondent, rather, was contemplating calling Mr. Ray Stanbury, due to the fact we got into some discussion as

to whether or not he should have [113] answered the several letters, or, rather, the one letter. However, Mr. Stanbury is in trial this morning and said he would be available shortly after the noon hour.

The Court: We will hear him when he is available.

Mr. Wright: All right, sir. Thank you.

Mr. Gallagher: I don't want the record to stand as Mr. Wright has stated. We didn't get into any argument about whether Mr. Stanbury should have answered these other letters at all.

I offered these letters on the theory they were received by the Ace Tractor & Equipment Co., and my point was that Ace Tractor & Equipment Co. had not answered one of the letters at all.

So that when Mr. Stanbury comes in your Honor will rule on whether his testimony is admissible or isn't admissible.

The Court: Of course, Ace Tractor & Equipment Co. was at the pertinent time a corporation. It could only act through natural persons.

Mr. Gallagher: That is right.

The Court: And it might be that Mr. Stanbury was one of those persons bearing such a relation to that corporate defendant or respondent that he was the one who would have a duty to reply to an accusatory statement, if there was such a duty.

I think the case is such that we shouldn't build up too [114] much on this idea of accusatory statements. It is part of a case, of course, but I have never heard of an accusatory statement and a failure to respond as being cited in favor of the person who

made the statement simply because there had been an accusation and a silence. It is taken in connection with all the other evidence.

In any event, we have a respondent here who desires to put on some testimony of a witness who is not presently in court. So we will hear him this afternoon.

What time do you think would be convenient?

Mr. Wright: I was thinking if we could perhaps reconvene not later than 1:30, perhaps Mr. Stanbury could be here and perhaps get back to his other trial.

Mr. Gallagher: Perhaps we could read a stipulation with reference to what testimony Mr. Stanbury would give.

If your Honor admitted it, I could state my objection to it and your Honor could either sustain it or overrule it. As I get it, what they want Mr. Stanbury to do is to come here and testify, not that he answered any letter excepting the one with reference to which an answer is in the record, but for the purpose of giving his own reasons for not answering the others, which obviously I don't think would be competent evidence.

His conclusions and opinions, with reference to why he didn't answer the other letters, if he was acting as an agent [115] for Ace Tractor & Co. wouldn't be competent evidence.

Mr. Wright: I additionally wanted to establish through Mr. Stanbury that the original of the letter which Mr. Gallagher says went to Ace Tractor, carbon copy of which went into evidence, was sent

to Mr. Ray Stanbury by the general counsel for Ace Tractor.

And this letter, I think, is largely self-explanatory. They sent it to him for further handling. That is, the December letter.

I have asked Mr. Stanbury to search his files, to see if any reply was made thereto or refresh his recollection, if he can, to decide why he didn't choose to answer this December letter.

Mr. Gallagher: That is the part I would object to, is why he didn't choose, and so forth.

The Court: Is that a proper matter that can be stated by a person who is in a position where an accusation has been made? Can you state why he didn't choose to reply?

Mr. Wright: Yes, I think it can, your Honor. After all, we had the first letter in March, which was sent to Mr. Stanbury. He replied. I think the reply speaks for itself.

Then, contrary to good ethics and practice, Mr. Gallagher's associates, Bogle, Bogle & Gates, continued to correspond directly with Ace Tractor, knowing full well months earlier Mr. Stanbury was their attorney. [116]

I am inclined to think he might have acted like any of us would, if you have some attorneys who persist communicating with your client. You would be very exercised. I don't know what his reason was.

Mr. Gallagher: There was no litigation pending in which Mr. Stanbury represented Ace Tractor as an adversary of Olympic Steamship Co. Mr. Stanbury was not employed by Ace Tractor Co. at all.

If he comes here to testify, I think I can establish that as a fact.

Mr. Wright: Mr. Stanbury is the very person whom Mr. Gallagher is relying upon to prove the approval of the settlement.

Mr. Gallagher: We stipulated he acted as an agent for that purpose. That is in the pre-trial stipulation.

The Court: We will hear him and rule on specific objections when and if they are made. It poses a little difficulty in hearing him at 1:30. This judge doesn't eat lunch every day, and this happens to be a day I do. On days I do I usually surround myself with friends.

Some of my old friends in the United States Attorney's Office are going downtown and have lunch with me today. It is not likely we will be back by 1:30.

Mr. Wright: I think Mr. Gallagher suggested what we might stipulate to will be the answer. Perhaps, if it need be, we can bring him over at 3:00 o'clock at some recess, in [117] his own trial.

The Court: I don't mind hearing him after he has finished for the day over there.

Mr. Wright: I will communicate with him.

Mr. Gallagher: Your Honor, I am going to be compelled by the practical angles of another case to be in my office from 4:00 o'clock on, because I have a witness coming up to see me, a seaman, and he is about ready to take off, and I want to get his testimony in some fashion.

The Court: We have to live with these practical

necessities, and inconveniences of people at times. We aren't limited to the practical convenience of the judge, who wants to eat lunch with some friends.

Mr. Gallagher: Perhaps you could get in touch with him in the courtroom where he is, and he come over here after he gets through and we could be through in five minutes.

The Court: Find out when you can bring him in, at a time that is convenient to everyone, and we will hear him at that time. Do you have any other evidence?

Mr. Wright: No, your Honor. I was going to inquire of the court whether it desired to hear oral argument this afternoon, because I think we will dispose of Mr. Stanbury very shortly.

The Court: If you can't arrive at a stipulation, suppose that we put it over until early tomorrow morning, so we can [118] get Mr. Stanbury before he is due to appear in whatever court he is engaged in.

We could convene at 9:00 o'clock, if necessary, and hear him then and proceed to argument after all that evidence is in.

Mr. Wright: I see. May I make this suggestion: I will communicate with Mr. Stanbury and then Mr. White, and if he can't come over this afternoon, then the matter can go over until tomorrow morning, until 9:00 o'clock.

Mr. Gallagher: Why wouldn't it be better to go over until tomorrow at 9:00 o'clock and make sure.

Mr. Wright: I think that is a better suggestion.

Mr. Gallagher: And give him a chance to go over his file.

The Court: We have nothing further on our calendar until Friday.

Mr. Wright: I think that would be a good idea.

Mr. Gallagher: I think it would be a good idea to go over until tomorrow, and then Mr. Wright can chalk up another per diem.

Mr. Wright: He knows I don't practice the way he does.

The Court: I didn't mean to take such a long recess. I thought you were having discussion over that settlement. I didn't mean it to spread out over 40 minutes, and then I found someone thought I was busy, but I wasn't. We always [119] have someone visit in chambers, but we can terminate the visit and come back in court when you are ready.

Don't let the fact I don't come out promptly bother you. If you are ready to go ahead, tell the clerk and he will signal.

We will now recess until tomorrow morning at 9:00 o'clock.

(Whereupon, at 12:00 o'clock noon, Wednesday, January 13, 1954, an adjournment was taken until Thursday, January 14, 1954, at 9:00 o'clock a.m.) [120]

Thursday, January 14, 1954. 9:10 A.M.

The Court: Good morning.

Mr. Gallagher: Good morning, your Honor.

Mr. Wright: Good morning, your Honor.

Respondent would like to call as a witness Mr. Ray Stanbury, if the court please.

The Court: Yes.

RAYMOND G. STANBURY

called as a witness on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

The Clerk: Your name, sir?

The Witness: Raymond G. Stanbury.

Direct Examination

By Mr. Wright:

Q. Mr. Stanbury, you are an attorney at law, licensed to practice in the State of California, and also admitted to the Bar of this court, are you not?

A. Yes, I am.

Q. You were, were you not, the attorney of record originally in the case now pending before this court, Olympic Steamship Co., Inc., v. Ace Tractor & Equipment Co.?

Mr. Gallagher: That is objected to upon the ground the record is the best evidence, and he never was.

The Court: It is, but—— [122]

Mr. Gallagher: He never was attorney of record in this action, your Honor.

(Testimony of Raymond G. Stanbury.)

The Court: It is not particularly important, but you can cross-examine on it if you like. I suppose it is just intended to orient this witness to the facts of this case and the court to the relationship of the witness to it.

Now, I know very well you weren't attorney of record in Klubnik v. Coastwise; Mr. Sikes was. But you have been here arguing on it, so I know very well you might as well have been attorney of record. I see you looking now in a state of bewilderment as if you thought you were.

Mr. Gallagher: I was. I signed the pleadings.

The Witness: I was going to say I was, but Mr. Gallagher makes me wonder.

Mr. Gallagher: Mr. Stanbury represented Ace Tractor in a suit which was pending in the Superior Court of the State of California, entitled Calvin Sides v. Ace Tractor & Equipment Co.

The Witness: That is right.

Mr. Gallagher: He never was an attorney in this action.

The Witness: I thought Mr. Wright asked me——

Mr. Wright: I beg your pardon. The record speaks for itself.

The Court: That is what? From what you had stated, Mr. Gallagher, I thought I had overlooked something. [123]

Mr. Gallagher: There has been a substitution.

Mr. Wright: If the court please, I would like to show the witness a stipulation extending time to

(Testimony of Raymond G. Stanbury.)

plead in the matter of Sides v. Ace Tractor & Equipment, No. 12,633.

The Witness: Harry D. Parker, who signed for my firm, is one of my partners, and I am a member of that firm.

Q. (By Mr. Wright): And you were at the time that stipulation, or that stipulation was executed and signed by Judge Yankwich on the 18th day of December, 1950? A. I was.

Q. Mr. Stanbury, I show you a letter and an envelope which have been introduced into evidence as Libelant's Exhibit No. 6.

The Court: So I can follow, let's see what that libelant's exhibit is.

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Wright): I now show you a letter on the letterhead of Cannon & Callister, law offices, dated December 16, 1949, and ask you if you have ever seen that letter. A. Yes, I have.

Q. And I show you a letter which bears the letterhead of Bogle, Bogle & Gates of Seattle, Washington, dated December 10, 1949, and ask you if that letter, together with [124] its attached sheet on the letterhead of Levinson & Friedman, accompanied the letter which I previously showed you of Cannon & Callister dated December 16, 1949.

A. That is right, it did.

Mr. Wright: Your Honor, we will offer these three sheets of paper into evidence for the limited purpose only of showing that the original of the

(Testimony of Raymond G. Stanbury.)

Libelant's Exhibit No. 6 was in due course sent to Mr. Stanbury.

The Court: These are being, as I understand it, that is, these three papers, being the Bogle letter and the Cannon letter——

Mr. Wright: That is correct. And the third sheet is an enclosure to the Bogle letter.

Mr. Gallagher: I object to the attempt of proctor for respondent to limit the effect of the evidence.

The Court: No proctor can limit the effect of evidence unless he has a stipulation from his opposition he considers it so limited. I think even so the inherent power of the court allows the court to consider it for all proper purposes.

The court will consider this for all proper purposes. It is admitted in evidence as respondent's next in order.

The Clerk: One exhibit, Mr. Wright?

Mr. Wright: Just one, I think, will be all right.

The Clerk: Exhibit D.

(The documents referred to were marked Respondent's Exhibit D and were received in evidence.) [125]

Q. (By Mr. Wright): Mr. Stanbury, I show you another letter dated December 28, 1949, on the letterhead of Murray H. Roberts, dated December 28, 1949, addressed to Parker, Stanbury & Reese, and ask you if you have ever seen that letter before? A. Yes.

Q. Where?

(Testimony of Raymond G. Stanbury.)

A. Well, I saw it when it arrived in my office, and I saw it again this morning.

Q. Did you see it on or about the date which it bears, December 28, 1949?

A. Well, somewhere around that time. I got it as a reasonably current letter.

Mr. Wright: We offer this as respondent's next in order.

The Clerk: Respondent's Exhibit E.

(The document referred to was marked Respondent's Exhibit E and was received in evidence.)

Mr. Wright: I have no further questions.

Cross-Examination

By Mr. Gallagher:

Q. Mr. Stanbury, when you received this letter from Cannon & Callister, with its enclosure, did you on behalf of Ace Tractor & Equipment Co. make any reply to Bogle, Bogle & Gates, or to the Olympic Steamship Co.?

A. I am almost certain I didn't. My file no [126] longer exists, but I have a recollection about it, and my best recollection is that I made no reply to it.

Mr. Gallagher: That is all.

The Court: Were you actively handling the matter at that time?

The Witness: I was, Judge, yes.

(Testimony of Raymond G. Stanbury.)

The Court: Were you in occasional telephone conversation with, what was it, Bogle, Bogle & Gates?

Mr. Gallagher: Bogle, Bogle & Gates.

The Court: Yes. Were you in occasional telephone conversation or personal conversation with representatives of that firm, or do you remember?

The Witness: Judge, I have no recollection at all. I haven't any recollection at all whether I ever talked to them on the telephone at all.

Is Roberts the name—"Roberts" signed to that? If he were a Los Angeles man, my recollection would be that I had talked to him. I may merely have talked about him. Is that from Seattle, that letter, that Roberts' letter?

Mr. Gallagher: No. The Roberts letter is from Wilmington, California.

The Witness: All right. All right. I did talk to Roberts by telephone; I did. I remember, but when it was or what was said I don't know, except I remember the subject matters of the conversations. The subject matters I can tell [127] you, if you care to know what they were, Judge.

The Court: I will not ask you that.

The Witness: All right. Well, the subject matter of my telephone conversation or conversations with Mr. Roberts I do remember. But what was said—I remember the subject that I discussed with him.

Mr. Gallagher: We have a stipulation, your Honor, with reference to the approval by Ace Tractor of the settlement, and the fact that Mr. Stanbury

(Testimony of Raymond G. Stanbury.)

was acting as the agent of Ace Tractor at that time.

I would object to any testimony which might purport to change or affect the terms of that stipulation.

Mr. Wright: I think it should be pointed out.

The Court: The letter approving the settlement, I think, bears Mr. Stanbury's signature.

Mr. Gallagher: Yes, it does.

The Witness: That is right, Judge.

The Court: If I recall the stipulation——

The Witness: That is right, Judge.

The Court: ——from what I understood, you were being brought in for today was to show when Olympic said to Ace, "You are the guilty party here. You owe Sides so much money. You did us wrong by having negligent, or having unseaworthy equipment negligently managed, operated and controlled," and so on, [128] that Mr. Stanbury just sat back and said nothing in reply to the accusation.

The Witness: I remember that, and my reasons for that.

Mr. Wright: May I ask a question?

The Court: Yes.

Redirect Examination

By Mr. Wright:

Q. Mr. Stanbury, you said you recall you did not reply to the letter of Bogle, Bogle & Gates, dated December 10, 1949, which was sent to you by Messrs. Cannon & Callister? A. That is right.

(Testimony of Raymond G. Stanbury.)

Q. If you did not, can you tell us why you did not? A. Yes.

Mr. Gallagher: That is objected to on the ground it calls for evidence that would not be competent of any fact; merely conclusions and opinions of the witness.

The Court: Mr. Gallagher, I can't cite you Wigmore on this, as I often do, and so far the score is at least even on whether Wigmore is upheld or not. But it does seem to me a reasonable rule, and I don't think it conflicts violently with any of our rules of evidence, that an accusatory statement, unanswered, is tacitly an admission of what was given in the statement, if there were a proper reason for not answering that could be shown to soften the blow of the admission. [129]

The objection is, therefore, overruled, with a comment that in cases of this kind, in which the litigants are corporations, that accusatory statements would have to, in order to weigh heavily with this court, amount to almost such that if it were a contractual situation and were made to a specific corporation officer, who did not deny it, we would have something equivalent to an account stated.

Q. (By Mr. Wright): Do you recall the question? A. Yes.

Mr. Gallagher: We take an exception to that ruling.

The Court: Your exception is noted.

The Witness: The letter was written to my client and therefore I did not feel that any answer was

(Testimony of Raymond G. Stanbury.)

necessary, for the sake of courtesy, and I had already written them a letter before, in which I declined, on behalf of the company, any liability.

Mr. Wright: I have no further questions.

The Court: That ruling, Mr. Gallagher, in essence was the ruling admitting the testimony. How the testimony will be weighed, I gave you an indication of my transitory thought upon it, but how it is actually weighed in the ultimate decision of the case will be determined upon how you gentlemen advise me in your argument, how much my research need be weighed. [130]

Recross-Examination

By Mr. Gallagher:

Q. Mr. Stanbury, the letter you referred to in your last answer is the original of this photostatic copy of a copy dated May 20, 1949, addressed to Messrs. Bogle, Bogle & Gates, Seattle?

A. You mean the answer that I referred to having made previously? That is it (indicating).

Q. When you said you wrote and denied liability, that is the full letter to which you refer?

A. That is it. That is the full letter I referred to.

Q. Mr. Stanbury, you had no personal knowledge with reference to how this accident happened up in Amchitka?

A. Personally none, none whatever.

Mr. Wright: I move to strike the answer, in order to object to the question. I think we are belaboring this point unduly.

(Testimony of Raymond G. Stanbury.)

It seems to me obviously neither Mr. Stanbury, nor, indeed, Messrs. Bogle, Bogle & Gates, acting through the attorney up there, making the accusation up there had no personal knowledge.

The Court: Neither you nor Mr. Gallagher?

Mr. Wright: None of us have.

Mr. Gallagher: My point is the evidence in this case shows that Ace Tractor did have men on the job up there whom [131] they haven't produced here, for instance, a Mr. Dean.

The Court: The motion to strike the answer for the purpose of the objection is granted. The objection is overruled, and the answer is reinstated.

Mr. Gallagher: That is all. Thank you very much for coming over.

(Witness excused.)

Mr. Wright: The respondent rests, your Honor.

The Court: Is there any rebuttal?

Mr. Gallagher: No, your Honor.

The Court: Is the cause ready for submission, so far as evidence is concerned?

Mr. Gallagher: Yes, your Honor.

Mr. Wright: Yes, your Honor.

The Court: It is very fresh in my memory now, that is, the evidence which has come in.

I would like to hear brief argument and determine it upon argument, unless either one of you believe now or believe from any ignorance of the principles which I might display in my questions or comments that you need to brief it.

Mr. Wright: I would just as soon argue the matter at this time.

Mr. Gallagher: We are submitting, as I understand it, the question of liability.

Mr. Wright: Yes. [132]

The Clerk: I only have that marked for identification, that particular letter.

The Court: Aren't you also submitting the letter of contribution——

Mr. Gallagher: Yes.

The Court: ——or don't you think that is in it any more?

Mr. Gallagher: I think that is in it. Not on the theory of contribution between joint tort feasors, but on the theory that money was paid out for the use and benefit of Ace Tractor in obtaining a release for Ace Tractor, executed by Sides, and a dismissal with prejudice of the action which he had commenced in the Superior Court against Ace Tractor here in Los Angeles.

I notice that this one exhibit is only in for identification, your Honor. I think it should be in evidence. That is the copy of the letter of December 10, 1949, addressed to Ace Tractor & Equipment Co., signed by Bogle, Bogle & Gates. It has been referred to throughout the trial as though it were actually in evidence.

The Court: It is now admitted.

(The document heretofore marked Libelant's Exhibit 6 was received in evidence.)

The Court: For your information, so far as the

court presently views the matter, if Olympic succeeds in its case it recovers everything it had to pay out. [133]

We have talked a little about contribution and there are suggestions of contribution. Contribution rather implies a payment of something less than full reimbursement. I would appreciate your directing me to whatever there is in this case and in maritime or other law which would apply here, which would justify contribution on some other basis, if such exists, and if it should be on some other basis, tell me what you contend that basis is.

Mr. Wright: It is the position of respondent, if it please the court, that Olympic Steamship Co. can recover only on the theory of indemnity because of the Supreme Court case in January of 1953, I believe it was, of Halcyon Lines v. Haenn, 342 U. S., 282, in which the Admiralty Court expressly rejects the theory of any contribution between joint feasors.

The Court: It looks to me like a contract case again, in a little different setting, and with a little different contract. It is the Klubnik case all over again insofar as that case was litigated between the corporations, and not the original libelant when he was injured. You have a differently worded contract, haven't you?

Mr. Gallagher: Yes.

Mr. Wright: Yes.

The Court: It appears to me to be a question of applying and interpreting the particular contract which exists in this case, and determination of who was in control [134] of the apparatus and whose

apparatus was involved in the tortuous act, or if it isn't a tortuous act, a series of acts out of which the accident arose.

Mr. Gallagher: Returning to the question with reference to the subject that we have designated as contribution, it is not contribution in the sense that joint tort feasors are sometimes allowed contribution from the other in the statutes. They have statutes providing for that.

The Court: In maritime it is where two tugs collide in the harbor.

Mr. Gallagher: That is right. In a collision case maritime law recognizes contribution. But we claim full indemnity, in the first place. As an alternative, if the court denies full indemnity, we claim a right to a contribution from Ace Tractor on this theory:

Olympic Steamship Co. notified Ace it could settle Sides vs. Olympic. Sides had also brought suit against Ace Tractor & Equipment Co. in the Superior Court in California, the record of which is now before your Honor.

Ace Tractor insisted, as a condition to agreeing to the reasonableness of the settlement, that Olympic procure a release which would release Ace Tractor of all claims made by Sides and get a dismissal with prejudice of that action.

Obviously, a portion of the money paid to Sides by Olympic was paid in consideration of Sides' agreement to [135] release Ace Tractor & Equipment Co., and procure a dismissal with prejudice of the action, which had been commenced by Sides against Ace down here.

(Whereupon, closing argument was made by counsel for libelant and respondent.)

(Whereupon, at 10:10 o'clock a.m., Thursday, January 14, 1954, the hearing in the above-entitled matter was concluded.) [136]

Certificate

I, Virginia K. Wright, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 12th day of April, 1954.

/s/ VIRGINIA K. WRIGHT,
Official Reporter.

[Endorsed]: Filed April 21, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 57, inclusive, contain the original Libel; Answer; Findings of Fact and Conclusions of Law; Final Decree; Petition for Appeal; Order Allowing Appeal; Assignments of Error; Supersedeas Bond; Citation on Appeal; Notice of Appeal and Designation of Record on Appeal which, together with original Libelant's exhibits 1 to 6, inclusive, and respondent's exhibits A to E, inclusive, and reporter's Transcript of Proceedings on January 12, 13 and 14, 1954, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 23rd day of April, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14,330. United States Court of Appeals for the Ninth Circuit. Ace Tractor and Equipment Co., Inc., Appellant, vs. Olympic Steamship Company, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 24, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14330

ACE TRACTOR AND EQUIPMENT CO., INC., a Corporation,

Appellant,

vs.

OLYMPIC STEAMSHIP CO., INC., a Corporation,

Appellee.

APPELLANT'S STATEMENT OF POINTS

Statement of Points

The following is a concise statement of the points upon which Appellant intends to rely:

1. The evidence does not support the finding and adjudication that Appellant, at and immediately prior to the time of the accident to Calvin H. Sides, was the owner or in control of and selected for use a certain wire or steel cable, also referred to as a plow steel wire strap.

2. The evidence does not support the finding and adjudication that Appellant had supplied and brought aboard the SS Edward A. Filene that certain plow steel wire strap.

3. The evidence does not support the finding and adjudication that the said plow steel wire strap, was, at or immediately prior to the accident to

Calvin H. Sides, reeved through a limber hole in the side of the vessel.

4. The evidence does not support the finding and adjudication that at or immediately prior to the accident to Calvin H. Sides, a snatch block was attached to the two eyes of that certain plow steel wire strap.

5. The evidence does not support the finding and adjudication that the winch falls of the SS Edward A. Filene were attached to a certain slingload of steel mats at or immediately before said accident.

6. The evidence does not support the finding and adjudication that Gene Southerland was in charge of all loading operations and had supervision over all of the workmen on the said SS Edward A. Filene.

7. The evidence does not support the finding and adjudication that the winch operator of the SS Edward A. Filene was not a competent winch driver.

8. The evidence does not support the finding and adjudication that the said winch operator was known to be incompetent to Appellant.

9. The evidence does not support the finding and adjudication that Gene Southerland negligently permitted said winch operator to continue to operate and control said steam cog winch up to and including the time of the accident to Calvin H. Sides, and that said negligence was one of the proximate causes of the injury sustained by Calvin H. Sides.

10. The evidence does not support the finding and adjudication that the said plow wire strap, was not adequate for the purpose for which it was supplied and used at the time of the accident to Calvin H. Sides.

11. The evidence does not support the finding and adjudication that the inadequacy of said plow steel wire strap, was a proximate cause of its failure and parting.

12. The evidence does not support the finding and adjudication that the said plow steel wire strap failed and parted when being used for the purpose of assisting in dragging and pulling a sling load of landing mats.

13. The evidence does not support the finding and adjudication that all of the appliances and equipment being used at the time of the accident to Calvin H. Sides were under the management and control of Appellant.

14. The evidence does not support the finding and adjudication that the accident to Calvin H. Sides was such that in the ordinary course of things does not happen if those who have the management and equipment of said appliances and equipment use reasonable care.

15. The evidence does not support the finding and adjudication that the said SS Edward A. Filene was unseaworthy at the time and immediately prior to the accident to Calvin H. Sides.

16. The evidence does not support the finding and adjudication that the place where Calvin H. Sides was working at the time of his accident was not a reasonably safe place to work.

17. The evidence does not support the finding and adjudication that the failure of said plow steel wire strap caused and permitted the sling load of landing mats to swing and strike said Calvin H. Sides with great force and violence.

18. The evidence does not support the finding and adjudication that Appellant impliedly agreed with Appellee to supply and keep in order any equipment used aboard the said SS Edward A. Filene.

19. The District Court erred in not finding that Appellee, Olympic Steamship Co., Inc., was guilty of active fault or negligence in connection with the injuries or damage sustained by the said Calvin H. Sides.

20. The District Court erred in not finding that the receipt and release executed by Calvin H. Sides on or about the 16th day of January, 1950, did constitute a complete defense to the prosecution of the within libel by Appellee against Appellant.

21. The evidence does not support the finding and adjudication that there was any legal liability imposed upon Appellee as a result of the injury to Calvin H. Sides.

22. The evidence does not support the finding

and adjudication that Appellee was entitled to recover indemnity from Appellant in any amount.

23. The District Court erred in failing to state its conclusions of law separately and distinctly.

24. The District Court erred in allowing interest from date of June 7, 1950, at the rate of 7% per annum to the date of entry of final decree in the District Court.

* * *

Respectfully submitted,

LILLICK, GEARY & McHOSE,

GORDON K. WRIGHT,

By /s/ GORDON K. WRIGHT,

Proctors for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 29, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION AVOIDING PRINTING OF EXHIBITS

It Is Hereby Stipulated and Agreed by and between the parties, through their respective undersigned proctors, that, if the same meets with the approval of this Honorable Court, the Clerk of the Court need not direct the printing of the exhibits into the record in the within cause. Such portions of the exhibits as may be deemed necessary to the appeal herein shall be placed in an appendix to appellant's opening brief.

The reason for this stipulation is the desire of the parties to reduce the expense of printing insofar as the same is possible.

Dated: May 26, 1954.

LILLICK, GEARY & McHOSE,

GORDON K. WRIGHT,

By /s/ GORDON K. WRIGHT,

Proctors for Appellant.

LASHER B. GALLAGHER,

/s/ LASHER B. GALLAGHER,

Proctor for Appellee.

[Endorsed]: Filed May 28, 1954.

No. 14330.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACE TRACTOR & EQUIPMENT CO., INC.,

Appellant,

vs.

OLYMPIC STEAMSHIP CO., INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

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Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES PAGE

RULES

STATUTES

TEXTBOOKS

No. 14330.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACE TRACTOR & EQUIPMENT CO., INC.,

Appellant,

vs.

OLYMPIC STEAMSHIP CO., INC.,

Appellee.

APPELLANT'S OPENING BRIEF.

Basis of Jurisdiction of the District Court and This Court.

There is no dispute about the jurisdiction of the District Court or of this court. The litigation arises out of an agreement and claim for indemnity and the suit in the District Court was by libel *in personam* in admiralty.

Admitted allegations in the pleadings show that the causes of action set forth in the libel are within the admiralty and maritime jurisdiction of the District Court, pursuant to Article III, Section 2 of the United States Constitution, and Title 28, United States Code, Section 1333 [R. 13, 20]. The jurisdiction of this court to review the decree rests upon Title 28, United States Code, Section 1291, notice of appeal having been filed within the time provided by Title 28, United States Code, Section 2107.

Statement of the Case.

1. The facts which give rise to this litigation are briefly as follows:

Appellee Olympic Steamship Co., Inc., was the bareboat charterer of the S.S. Edward A. Filene, a United States Merchant vessel. On or about May 28, 1948, Olympic entered into a Voyage Charter Party with appellant, Ace Tractor & Equipment Co., Inc., which provided for a voyage from San Francisco to Alaskan waters and return. This Charter Party contained an indemnity clause [R. 4], reading as follows:

> "The Charterer agrees to provide and pay for workmen's compensation, job liability and other insurance required by law or custom upon stevedores or other workmen employed by or performing any of the duties of the Charterer hereunder at all ports or places of loading and discharging and will furnish the Owner upon demand a certificate of such insurance. The Charterer agrees to pay for all stevedore damage and to indemnify the Vessel and the Owner for any damage or expense caused by the act or neglect of the Charterer or its Agents or contractor appointed by the Charterer or performing any of its duties in the loading or discharging of the Vessel or from failure of equipment supplied by them."

Calvin H. Sides was employed by Olympic as radio operator and seaman for the voyage. While in Amchitka, in the Aleutian Islands, Ace commenced to load a cargo of scrap metal landing mats.

The members of the crew of the Edward A. Filene assisted in the loading. Sides was working in No. 4 hold. The procedure was for the landing mats to be lowered into the hold in bundles weighing about 2,000 pounds. Each load was supported by 2 falls, each running to a separate winch. Both winches were operated by the same driver, an employee of Ace and not a member of the crew. In order to place the mats in the "wings" of the hold, one fall lowered the mats directly through the hatch. The fall from the other winch was rove through a block attached by a wire strap either through a limber hole or pad eye in the frame of the side of the vessel and then attached to the load of mats. Thence, by slacking on the first and taking up on the second runner, the winch driver could pull the load sideways to the wing in the direction of the limber hole or pad eye. Once the load disappeared within the hold, it was not visible to the winch driver who then acted upon the directions of others. The precise manner in which the gear was rigged at the time of the accident is unknown.

Ace was in charge and control of the loading operation, although the master and first mate of the Filene had general over-all duties with regard to the operation, had inspected the stowing and the master received additional compensation from Ace for his assistance in the loading. The master was on the day in question present and participating in loading activities.

On the afternoon of June 19, 1948, a strap in No. 4 hold parted and a load of the steel mats struck Sides, seriously injuring him.

Subsequently, Sides commenced two actions to recover damages for his injuries. One, against Olympic, was commenced in the United States District Court, Western District of Washington, Northern Division, in which Sides based his claim as an injured employee upon allegations both of unseaworthiness of the vessel and negligence of Olympic.

Sides also brought suit against Ace in the Superior Court of the State of California, in and for the County of Los Angeles, alleging that the gear in No. 4 hold was jointly rigged by Ace and Olympic in an improper manner and that this, coupled with the incompetence of the winch driver which was also known to both Ace and Olympic, was "joint negligence" of both which was the proximate cause of Sides' injury.

Olympic negotiated a settlement with Sides in the amount of $14,000. In consideration of the procurement of a dismissal of Sides' action against Ace, counsel for Ace signed an agreement that the amount paid by Olympic was a fair and reasonable sum, but such agreement was made expressly without prejudice to Ace, and also stated "that by so agreeing we are not admitting any liability on our part." As a result, both actions were dismissed with prejudice by Sides.

2. The history of this action is as follows:

Olympic's libel contains two causes of action: the first seeks indemnification for the $14,000, together with additional enumerated expense of litigation; the second, upon the same facts, seeks contribution from Ace as a joint *tort-feasor* for a sum equal to the percentage of the whole damage, to which the alleged negligence of Ace contributed.

Appellant's answer denied liability under either cause of action.

Trial was held on January 12, 13, 14, 1954. No testimony of the injured man or any other eyewitnesses was placed in the record. The testimony as to the accident consisted solely of the deposition of the master of the Edward A. Filene [R. 119-142] and the loading manager or "walking boss" of Ace [R. 83-97], both of whom arrived at the scene of the accident after it had occurred.

On February 17, 1954, Ace filed and served objections to Olympic's proposed Findings of Fact, which were overruled without comment by the District Court. Thereafter the District Court issued its final decree in favor of Olympic and against Ace; followed by Findings of Fact and Conclusions of Law, dated and docketed February 18, 1954.

On March 26, 1954, appropriate documents for appeal from this decree were filed by Ace.

Specifications of Errors Relied Upon.

No. of Assignment of Error	Page of Record
1	42
2	42
6	43
7	43
8	43
9	43
10	43
11	44
12	44
13	44
14	44
15	44
16	44
17	44
20	45
21	45
22	45
23	45
25	46

ARGUMENT.

Prefatory Statement.

Olympic seeks indemnity from Ace. In order to succeed, Olympic must walk a thin line. It must establish facts which prove that it was liable to Calvin H. Sides for his injuries and not a volunteer in making payment for the same, and yet, such liability must not have been the result, even in part, of an independent act of negligence of its own.

This is true because of the well established rules that indemnity does not lie for the volunteer and that even in admiralty there is no contribution between joint *tort-feasors* in personal injury cases.

The Toledo, 122 F. 2d 255 (2 C. C. A., 1941); cert. den., 314 U. S. 689, 86 L. Ed. 551;

Halcyon Lines v. Haenn Shipping Corp. (1952), 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318.

This Is an Admiralty Case Based Upon Deposition and May Therefore Be Viewed De Novo by This Court.

This is an action in admiralty. In addition, all of the facts concerning the injury of Mr. Sides were presented to the trial court either by stipulation or deposition. For both reasons, it is well established that this court is not bound by the findings of fact below.

Admiralty courts are not as closely bound by the determination of the trial court as they would be if governed by Rule 52(a), Federal Rules of Civil Procedure, which re-

quires that the findings may be disregarded only if "clearly erroneous."

Cramp Shipbuilding Co. v. Luckenbach S.S. Co., 181 F. 2d 939 (C. C. A. 3, 1950);

Matson Nav. Co. v. Pope & Talbot, 149 F. 2d 295, 298 (C. C. A. 9, 1945), cert. den., *sub nom., Pope & Talbot, Inc. v. Matson Nav. Co.,* 326 U. S. 737, 90 L. Ed. 439.

As this court said in *Johnson v. Griffiths S. S. Co.,* 150 F. 2d 224 (9 C. C. A.), at page 225:

"Since all material facts in this case were established by deposition, the findings of the District Court are not accorded as great weight as they might be if that court had had an opportunity to observe and hear the witnesses testify to the facts. Furthermore, since this is a case in admiralty, the matter may be tried *de novo* in this court."

The Record Does Not Support a Finding of Defectiveness in the Strap.

ASSIGNMENT OF ERROR No. 1.

"The Court erred in finding that Respondent Ace Tractor & Equipment Company, Inc., at and immediately prior to the time of the accident to Calvin H. Sides, was the owner or in control of and selected for use a certain wire or steel cable, also referred to as a plow steel wire strap."

ASSIGNMENT OF ERROR No. 2.

"The Court erred in finding that Respondent, Ace Tractor & Equipment Company, Inc., had supplied and brought aboard the SS 'Edward A. Filene' a certain wire or steel cable, also referred to as a plow steel wire strap."

ASSIGNMENT OF ERROR No. 10.

"The Court erred in finding that the certain wire or steel cable, also referred to as a plow wire strap, was not adequate for the purpose for which it was supplied and used at the time of the accident to Calvin H. Sides."

ASSIGNMENT OF ERROR No. 11.

"The Court erred in finding that the inadequacy of that certain wire or steel cable, also referred to as a plow steel wire strap, was a proximate cause of its failure and parting."

ASSIGNMENT OF ERROR No. 12.

"The Court erred in finding that the said certain wire or steel cable, also referred to as a plow steel wire strap, failed and parted when being used for the purpose of assisting in dragging and pulling a sling load of landing mats."

ASSIGNMENT OF ERROR No. 13.

"The Court erred in finding that all of the appliances and equipment being used at the time of the accident to Calvin H. Sides were under the management and control of Respondent."

ASSIGNMENT OF ERROR No. 15.

"The Court erred in finding that the said SS 'Edward A. Filene' was unseaworthy at the time and immediately prior to the accident to Calvin H. Sides."

ASSIGNMENT OF ERROR No. 17.

"The Court erred in finding that the failure of that certain wire or steel cable, also referred to as a plow steel wire strap, caused and permitted the sling load of landing mats to swing and strike said Calvin H. Sides with great force and violence."

In reviewing this record it should be remembered that the burden is upon Olympic to establish all of the actionable facts. (*States S.S. Co. v. Rothschild International Steve. Co.,* 205 F. 2d 253 (9 C. C. A., 1953).) Except in the instant case, the parties stipulated to the fact that payment of $14,000.00 was made by Olympic to Sides and that if liability existed, the amount paid was a reasonable one.

However, to prevail, Olympic must still establish that the settlement made was on a claim for which it was liable and that this liability was not the result, even in part, of its own independent acts of negligence.

Whether this burden is met turns on the facts of record as to the accident and injury to Mr. Sides. The record here as to these facts is sparse, indeed. There is no testimony from anyone who saw the accident, nor of the injured man. Olympic's burden must be met, if at all, by the deposition testimony of its two witnesses, the master of the Edward A. Filene and the Ace walking boss, who arrived on the scene after the accident.

The paucity of the record is particularly evident with regard to the findings as to the parted strap.

The District Court found that Ace owned, selected and controlled this particular strap [Finding V]. Moreover, the strap was found to be not adequate [Finding VI], to have failed [Finding VIII], to be defective [Finding X] and unseaworthy [Finding VIII].

By stipulation the parties agreed that Ace was in charge and control of the loading of cargo in the hold at the time of Sides' injury. There was no evidence, however, as to control of the strap.

As to ownership, the record indicates only that Ace was supposed to furnish its own equipment [R. 65, 137] including straps. The ship had on board similar straps of its own [R. 130] which may possibly have been used [R. 136]. One of the libelant's two witnesses said that he could not swear who owned the strap in question [R. 66] while the other admittedly based his conclusion on what *should* have been the case [R. 137]. Appellant submits that such proof fails to meet the legendary bare scintilla necessary for a plaintiff or libelant to sustain its burden of proof.

However, this point need not be labored other than to indicate the general nature of the proof presented by Olympic. Throughout, the findings of fact have been drawn solely from what should have been or by what probably was—in short, by speculation. Eyewitness testimony or real evidence (*e.g.,* the strap itself) are nowhere in existence.

Admitting *arguendo* the ownership and control of the strap by Ace, there is no evidence at all that the strap was defective.

The sole evidence as to the condition of the parted strap was the tesitmony of the vessel's master, Gerald Reilly. He stated, "Well, it had been used but it was a fairly new strap. An old strap would be rusty or you could tell they had been used. They get kinky" [R. 126].

The record does contain the testimony of Reilly that the breaking point of such a strap in good condition was fifteen tons and that the safe working load of such a strap was about one-fifth of the breaking strain [R. 124]. The Master further testified that such a strap in good condition would stand a load of 2,200 lbs. without any

trouble [R. 126]. The sling loads of landing mats weighed approximately 2,000 lbs. [R. 59]. Since a broken strap was found at the scene it was evidently concluded by the court below that the strap must have been "defective" or "not adequate."

Such a conclusion is unwarranted. If a snatch block and strap were being used at the time of the accident, it was because the men were engaged in "winging out" the landing mats. The strap did not part while passively supporting a load of 2,000 lbs. The record is silent, however, as to the actual manner of rigging prior to the accident.

Mr. Southerland, the walking boss for Ace, testified for Olympic that the breaking of the strap could have been caused by "tight-lining" [R. 77]. He said:

> "Well, you see, when you are heaving on anything like that that has to be stowed out in the wing, and you are using a snatch block, you just have to barely float it, because you [31] have such poor drift anyway that you are almost pulling against the two runners, and if you try to go too high you start pulling against the two runners, and something has to carry away. I mean something just has to give if you keep heaving on it."

Thus, rather than a tension of only 2,000 lbs., such a maneuver could subject the strap to an excessive strain. A strap so parted may be termed "not adequate," but this is not because of any "failure" or defect which would create unseaworthiness. It is because *no* strap of workable dimensions could stand being subjected to the strain of two opposing winches.

In the absence of any evidence of defectiveness and with at least an equally plausible explanation of the

cause for the parting, it is submitted that the trial court erred in finding that the strap was defective or unseaworthy.

The Record Does Not Support a Finding of Incompetence on the Part of the Winch Driver.

ASSIGNMENT OF ERROR No. 7.

"The Court erred in finding that the winch operator of the SS 'Edward A. Filene' was not a competent winch driver."

ASSIGNMENT OF ERROR No. 8.

"The Court erred in finding that the said winch operator was known to be incompetent to Respondent."

ASSIGNMENT OF ERROR No. 9.

"The Court erred in finding that Gene Southerland negligently permitted said winch operator to continue to operate and control said steam cog winch up to and including the time of the accident to Calvin H. Sides, and that said negligence was one of the proximate causes of the injury sustained by Calvin H. Sides."

The sole references to the ability of the winch driver which were made in the record subject to various objections are as follows:

Testimony by Ace walking boss, Gene Southerland:

"Q. At any time did you form any conclusion, after observing his work, as to his ability or inability to operate winches? A. Well, he isn't a competent winch driver." [R. 69.]

"Q. Mr. Southerland, at what time after you reported to the vessel to work did you form any opin-

ion as to Mr. Bigsley's competency or incompetency to drive winches? A. When he first went to work." [R. 71.]

"Q. And could you tell us just briefly, as laymen what you, as an experienced winch driver, observed about Mr. Bigsley that permitted you to form a conclusion that he was not competent? A. Well, I don't know how to explain it to you.

Q. Well, in other words, just what you saw him do and what it meant to you? A. Well, here is—one way—now, you take a person that has any experience around gear like that—you know that gear is tested for five ton, but it isn't a good idea to take five ton right off the dock, although it is done lots of times, but someone like him, you could tell him to pick up ten ton with it, and he just has no idea of what the gear can do. I mean he is—put it this way: If he was here in the States where you had men, they wouldn't even let him take one load in. When he took one load, that would be the end of him." [R. 72-73.]

"Q. From your experience as a winch driver and from observing the operation going on at Amchitka just [28] prior to the accident, could you tell us just whether or not, in your opinion, the officers would have any reason to know that Mr. Bigsley was incompetent? Just 'Yes' or 'No.' A. No." [R. 74-75.]

"Q. When did you form an opinion that this chap whom you noticed at the winches, at No. 4, right after the accident, was incompetent as a winch driver? A. Oh, when we first started working cargo.

Q. Would you say two or three days [50] before? A. Well, whenever we started working cargo —four or five, or whatever it was.

Q. It was quite obvious to you that he didn't know what he was doing? A. Yes.

Q. But you nevertheless let him go ahead and continued to run this gear? A. I had no alternative.

Q. You had a chap by the name of Fink who was about to run winches who was on board? A. He was on another set of gear at the time.

Q. At which time are you refering to—at the time of the accident? A. See, at the time of the accident, I think he was tending hatch at No. 4, I think at that time, either that or he was driving 5. I forget just what it was now

Q. Well, if I were to tell you that he testified in one of these preceding proceedings that he was tending hatch at No. 4 at the time of this accident, would that refresh your recollection as to what he was doing at the time? A. See, he is the winch driver that I hired in Anchorage." [R. 93.]

"Q. Well, do you remember having seen Fink at [51] No. 4 right after this accident happened? A. Yes.

Q. Fink could run the winches, couldn't he? A. Yes, which he did.

Q. He took over after the accident? A. Yes. Well, he was running them—you see, they work hour for hour." [R. 94.]

"Q. Now, were all of those winch drivers that were engaged in this loading before the accident, with the exception of this fellow Bigsley, competent winch drivers, in your opinion? A. Well, I had one fellow before Bigsley I got rid of.

Q. And that was before the accident? A. Yes.

Q. The rest of them seemed to know what they were about? A. No, but that is all there was.

Q. You didn't see the accident, did you [53]? A. No, sir." [R. 95.]

Testimony by Captain Gerald J. Reilly:

"Q. Did you actually observe the winch driver named Bigsby or Bigby operating the winch which was involved in Mr. Sides' accident at any time before the accident? A. Well, I saw him there.

Q. Did he appear to you to be an incompetent winch driver or did he do anything that indicated to you that he was incompetent? A. Usually the way you tell is when they break down your gear.

Q. So you didn't see him break any of your gear? A. No." [R. 125.]

"Q. Nothing broke until the time of this accident? A. That's right." [R. 126.]

"Q. Captain, you actually relieved the winchman during various times of this unloading job? A. Once in a while.

Q. Up at Amchitka? A. Yes." [R. 142.]

This evidence must have been offered for one of two purposes: (1) To prove the commission of the particular act of negligence on the part of the winch driver which injured Sides; (2) to establish that Ace knowingly continued to employ an incompetent individual.

A party cannot prove the commission of a particular negligent act by opinion evidence of an actor's general lack of skill.

Rowe v. Such, 134 Cal. 573, 66 Pac. 862;

1 *Wigmore on Evidence,* p. 476.

With regard to the second purpose, general incompetence can sometimes be established by evidence of particular past actions.

Holland v. Southern Pacific Company, 100 Cal. 240, 34 Pac. 666.

It is significant that Olympic developed no evidence of particular past actions. The sole reference to any specific action by the winch driver is from the Master, Reilly, whose test of a winch driver's competence was whether he broke down gear. Reilly did not see the driver do this [R. 125].

In the absence of concrete examples, Olympic resorted to opinion testimony of Southerland to establish the employment of a known incompetent.

Upon being asked his opinion, Mr. Southerland jumped to the ultimate fact. "Well, he isn't a competent winch driver." [R. 60.] We were told nothing more. What does this mean? What are Mr. Southerland's standards of judgment? Does he mean that the driver was less able than himself and therefore "incompetent"; that he was less able than the drivers in the United States proper, but as available as any in Alaska? Opinion testimony cannot include the bald statement of ultimate facts.

2 *Jones on Evidence,* 4th Ed., Sec. 372, p. 697.

No concrete reasons were given for Southerland's opinion. When asked for them, he professed inability to explain [R. 72]. Then he answered by merely re-stating his opinion [R. 73]. It is always the duty of the party utiliz-

ing alleged expert testimony to make clear the factual basis upon which the person's opinion will be based. This is customarily done by the hypothetical question. In the instant case, no factual basis is presented at all.

The opinion of an expert as to a person's lack of judgment should be tested by a consideration of the facts from which that opinion is derived, and if they do not justify the conclusion, the opinion is arbitrary and to be rejected.

> *Guardianship of Waite* (1939), 14 Cal. 2d 727, 97 P. 2d 238.

It is submitted that the instant case comes clearly within the logic of the *Waite* decision and that Southerland's testimony must be disregarded for purposes of this appeal.

Olympic Made Payment to Calvin H. Sides as a Volunteer and Thus Is Not Entitled to Indemnity.

Assignment of Error No. 14.

> "The Court erred in finding that the accident to Calvin H. Sides was such that in the ordinary course of things does not happen if those who have the management and control of said appliances and equipment use reasonable care."

Assignment of Error No. 22.

> "The Court erred in finding that there was any legal liability imposed upon Libelant Olympic Steamship Co., Inc., as a result of the injury to Calvin H. Sides."

To bolster the judgment below in the absence of any evidence demonstrating what proximately caused Sides' injury, Finding No. 14 suggests that Ace is responsible

because of the doctrine of *res ipsa loquitur*. This approach is patently inconsistent with Olympic's own admission of negligence [R. 11].

Olympic, however, to recover indemnity must prove its settlement with Sides was not as a volunteer but prompted by the fact that Sides could have in the first instance recovered a judgment from Olympic.

> *Oregon-Washington R. & Nav. Co. v. Washington Tire & Rubber Co.,* 126 Wash. 565, 219 Pac. 9 (1923);
>
> *State v. City of Bremerton,* 2 Wash. 2d 243, 97 P. 2d 1066 (1940).

The findings of the trial court place no responsibility for Sides' injury on Olympic because of its own acts. Assuming for argument the validity of these findings, Olympic's liability must have been imputed and without active fault. It is obvious that what was here contemplated was the shipowner's liability for unseaworthiness, a form of absolute liability.

It has been shown that there is no evidence as to defectiveness in the strap which might have caused the accident. Conceivably, there are several explanations as to how the incident might have occurred, not all of which would be actionable. One possible cause might be "tight lining" of the runners by the winch driver which could create such tension that the strap would part.

Would this negligence of Ace's agent create liability on the part of Olympic? The findings assume that in such a case Olympic would be liable to Sides for unseaworthiness.

It is submitted that the law creates no such liability, as a review of the concept of seaworthiness will show.

A Single Transitory Act of Negligence Committed by a Third Person Cannot Create an Unseaworthy Condition Resulting in the Shipowner's Liability.

ASSIGNMENT OF ERROR NO. 15.

"The Court erred in finding that the said SS 'Edward A Filene' was unseaworthy at the time and immediately prior to the accident to Calvin H. Sides."

ASSIGNMENT OF ERROR NO. 16.

"The Court erred in finding that the place where Calvin H. Sides was working at the time of his accident was not a reasonably safe place to work"

Seaworthiness means the sufficiency of a vessel, her equipment, provisions and crew, to undertake the voyage or service in which she is employed. Obviously, there can be no fixed or positive standard of seaworthiness. Seaworthiness is a relative term and the standard varies with the type of vessel and her undertaking. Absolute perfection is not required; rather, the test is one of reasonable fitness. *The Southwark,* 191 U. S. 1, 48 L. Ed. 65 (1903). However, if there is a finding of unseaworthiness in a personal injury case, the vessel and her owners are liable without regard to fault or the exercise of due diligence to make the vessel seaworthy.

In a personal injury case a jury charge on the subject of unseaworthiness was reviewed. (*McLeod v. Union Barge Line Co.,* 95 Fed. Supp. 366 (W. D. Pa., 1951), affd. *per curiam,* 189 F. 2d 610 (C. C. A. 3, 1951). At *page 369* the following jury instructions were held properly to define seaworthiness:

> " ' "Seaworthiness" means reasonable fitness for the voyage or the work to which the vessel is to be applied. It is a vessel in a fit state as to repairs,

equipment and crew, and in all other respects to encounter and meet the ordinary perils of the voyage. The test of seaworthiness is whether the vessel is reasonably fit to carry a cargo and crew which she has undertaken to transport.

" 'To review, seaworthiness means reasonable fitness to meet the circumstances and the use to which the boat is to be applied on the waters where it is sailing. It means that ordinary and usual circumstances must be anticipated by the owner or the master of the ship to provide the seaman or the employees with a vessel that is sufficient and fit to encounter the ordinary perils of the contemplated voyage. In short, it is the sufficiency of the boat or the vessel in materials, construct (*sic*), function, equipment, officers, crew and outfit for the trade or service in which it is being employed.' "

This obligation, traditionally owed by an owner of a ship to seamen, has been extended to those working aboard the ship.

Seas Shipping Co. v. Sieracki, 328 U. S. 85, 90 L. Ed. 1099;

Pope & Talbot v. Hawn, ... U. S. ....., 98 L. Ed. (Adv.) 101.

These cases establish this duty on the part of Olympic to Sides, whether he was considered a member of the crew or an employee of Ace Tractor. Moreover, the obligation covers such a person where the unseaworthy condition is created by defective equipment, even if the equipment was owned by a third party.

Alaska S.S. Co. v. Petterson, ... U. S. ....., 98 L. Ed. (Adv.) 499.

Yet liability for unseaworthiness must be distinguished from liability for negligence. (*Pope & Talbot v. Hawn, supra,* (esp., concurrence of Frankfurter, J., p. 107 *et seq.*). Of course certain negligent acts can create an unseaworthy condition. (*State S.S. Co. v. Rothschild,* 205 F. 2d 253 (C. C. A. 9, 1953).) But negligent acts which create unseaworthiness must create a condition of some permanence. Unseaworthiness has never been applied to transitory unsafe conditions.

In *Cookingham v. United States,* 184 F. 2d 213 (3 C. C. A. 1953), cert. den. 340 U. S. 935, 95 L. Ed. 675, while going down a stairway a ship's cook slipped on a substance, apparently jello, injuring his knee. The court held that the vessel was not liable for unseaworthiness, saying:

> "We agree with the district court, however, that the doctrine of unseaworthiness does not extend so far as to require the owner to keep appliances which are inherently sound and seaworthy absolutely free at all times from transitory unsafe conditions resulting from their use, as happened in the case before us. * * *
>
> "In the present case the stairway upon which the libelant slipped was perfectly sound, its unsafe condition being the sole result of the temporary presence of a foreign substance upon it. To extent the doctrine of unseaworthiness to cover such a case as this would be to make the shipowner an insurer against every fortuitous or negligent act on shipboard which results in temporarily rendering an appliance less than safe even though he may have no knowledge of or control over its happenings, and without giving him a reasonable opportunity, such as is afforded by the safe place to work doctrine of the law of negli-

gence, to correct the condition before he becomes liable for it. The ancient admiralty doctrine of unseaworthiness has never gone so far."

This distinction was recognized by this court in *State S.S. Co. v. Rothschild, supra,* when it discussed examples of negligent acts which created an unseaworthy condition. Thus analogy was drawn to the duty of a landowner to keep his premises in a safe condition, or of a municipal corporation to maintain its streets. These analogous cases show the inherent limitation in the doctrine. Thus, a municipality is not liable for the damage caused by an automobile collision merely because the cars were upon a public street. The duty to maintain in a safe condition applies only to matters over which the municipality, landowner or shipowner can have some control and about which they can have some knowledge. This duty cannot extend to the fleeting, transitory acts of negligence of a third party.

The law imposes no such liability on shipowners through the doctrine of unseaworthiness.

The Findings Justify No Other Basis for Liability of Olympic to Sides.

Appellant contends that the record cannot substantiate either findings of defectiveness in the strap or incompetence on the part of the winch driver. It further contends that one act of its servant, the winch driver, even if negligent, could not create liability on the part of Olympic.

For these reasons, Olympic would not be liable for any acts of Ace, and any payment to Sides made on this basis would be as a volunteer.

Even if Liable, Olympic Was Only so as Joint Tortfeasor and May Not Seek Indemnity.

ASSIGNMENT OF ERROR No. 20.

"The Court erred in finding that libelant Olympic Steamship Co., Inc., was not guilty of any active fault or active negligence in connection with the injuries or damage sustained [47] by the said Calvin H. Sides."

ASSIGNMENT OF ERROR No. 21.

"The Court erred in failing to find that the receipt and release executed by Calvin H. Sides on or about the 16th day of January, 1950, did not constitute a complete defense to the prosecution of the within libel by Libelant Olympic Steamship Co., Inc., against Respondent Ace Tractor and Equipment Co., Inc."

If there is no liability on the part of Olympic because of unseaworthiness, what other possible grounds exist? Olympic would not, of course, be liable in negligence for the acts of Ace's servants. Theoretically, this leaves only liability for acts of Olympic's *own* agents either in negligence or for unseaworthiness. Even if such acts were only partially responsible for the accident, they would preclude indemnification.

It is clear that the injured man believed that Olympic was a party to his injury. Thus Sides' complaint against Olympic alleged liability on the part of Olympic for unseaworthiness *and* negligence [R. 31]. These claims were not made alternatively. His complaint against Ace alleged, among other things, the *"joint* negligence" of both Ace and Olympic caused by *joint* rigging in an improper manner. [Libelant's Ex. 2.]

In *Lamb v. Belt Casualty Co.* (1935), 3 Cal. App. 2d 624, 40 P. 2d 311, in determining the liability of an alleged indemnitor, the court looked to the original complaint of the injured parties, which alleged liability because of negligent operation of a "truck and trailer." The defendant's contract for liability applied only to the truck. At trial of the first action, the facts indicated that the collision had been only to the trailer, which had been improperly lighted, although lights were on the truck itself. Nevertheless, the court held defendant liable, stating at pages 628-629:

> "By returning general verdicts awarding damages to the plaintiffs, Davis and Barr, the jury in each case impliedly found that both truck and trailer were at the time of the accident being operated negligently and that the negligent operation of the truck, as well as the trailer, contributed proximately to the injuries complained of and to the damage of the plaintiffs in the amounts awarded (24 Cal. Jur. 893)."

In the instant case the original action did not result in a general verdict but rather a settlement; however, the court in the *Lamb* case held that a judgment or a settlement would have equal effect (p. 631). (See, also, *Chrysler Motors v. Royal Indemnity Co.* (1946), 76 Cal. App. 2d 785, 174 P. 2d 318.) In either situation, therefore, there is an implied finding as to the facts alleged in the original complaint.

The settlement agreement of Olympic itself does nothing to negate liability for Olympic's negligence. Indeed, the agreement recites that the payment to Sides was for "all damages * * * for negligence or otherwise" [R. 9]. Thus, negligence is expressly stated as the ground for settlement.

Nor does the somewhat sparse evidence fail to show some evidence of its initial liability for negligence. Thus, both the captain and chief mate had general inspection duties with regard to the loading operation [R. 58, 130], and the master received $200 in additional pay for assisting in the cargo loading [R. 137]. Captain Reilly, in fact, at times operated the ship's winches [R. 142].

It should be noted that the rigging in the hold was frequently changed and the strap and snatch block shifted. Southerland testified that if the strap had been rigged through a limber hole it would have come in contact with a relatively sharp surface and that it is possible through continued use or excessive strain for the strap to be cut [R. 91]. Working in the hold with Sides at the time of the accident were 8 other members of the crew [R. 135].

Olympic is well aware of this problem. It sought relief by characterizing its admitted negligence as "passive" [R. 11], although its second cause of action shows anticipation of a possible alternative interpretation and seeks contribution from Ace as a joint tort-feasor [R. 14].

But Olympic, because it was first on the scene, may not append undisputed labels to its conduct. The nature of its actions must be determined from the facts. Its admitted negligence may give rise to an independent cause of action.

If there was independent liability of Olympic, it may not seek indemnity here. Thus, in *Alaska Pacific S.S. Co. v. Sperry Flour Co.* (1922), 122 Wash. 642, 211 Pac. 761, a longshoreman recovered against a steamship company for a fall from a plank because of the failure of the company to supply a safe place to work. The steamship company sought indemnity against the pier owner. The

court held that while the pier owner was primarily liable to keep the premises safe,

> "* * * still, if the steamship company by some independent act of negligence on its part caused or contributed to the accident, it thereby would become a joint *tort-feasor* and could not recover. * * * That primary duty, however, on the part of respondent did not relieve the appellant from the duty of exercising care in the control of and with respect to the condition of appliances which it called upon its servant to use at the risk of becoming a joint *tort-feasor* and the denial of the right to recover over from the one primarily liable."

Once the independent act creating liability is shown, questions of "primary and secondary" or "active and passive" negligence disappear.

> "There can arise no issue of primary and secondary liability—or question of active or passive negligence—between joint tort-feasors where their concurring act of negligence results in injury to a third party. * * *"
>
> *Fidelity & Casualty Co. of New York v. Federal Express,* 136 F. 2d 35, 42 (C. C. A. 6, 1943).

The possibility of independent liability alleged in both of Sides' complaints, the sole ground for liability expressly mentioned in the settlement agreement, and substantiated by the sparse evidence in the instant record must be negated by libelant in order to prevail. On this record such negation is not present.

It is significant that this action was commenced before the decision in the *Halcyon* case. It is thus not mere speculation to assume that its gravamen was a desire for contribution between joint tort-feasors, a possibility which

then was widely considered available in admiralty personal injury cases.

The theory of contribution was never abandoned by Olympic. Its counsel submitted at the conclusion of the trial that contribution could be awarded not on the theory of joint tort-feasor responsibility but on the theory that money was paid by Olympic for the benefit of Ace in securing a release and a dismissal of Sides' litigation against Ace [R. 161, 163].

Conclusion.

There has been error which appellant asks the Court of Appeals to correct by reversing the District Court's final decree awarding judgment to Olympic Steamship Company, Inc., in the sum of $16,250.85, with interest thereon from date of June 7, 1950, at the rate of seven per cent (7%) per annum. The record clearly fails to establish facts sufficient to support a judgment in the first instance in favor of injured seaman against Olympic. It further fails to negate the possibility that Olympic might not have been equally responsible with Ace for said injury.

Respectfully submitted,

LILLICK, GEARY & MCHOSE,
GORDON K. WRIGHT,
Proctors for Appellant, Ace Tractor & Equipment Company, Inc.

No. 14330

United States Court of Appeals

for the Ninth Circuit

ACE TRACTOR AND EQUIPMENT COMPANY, INC.,

Appellant,

vs.

OLYMPIC STEAMSHIP COMPANY, INC.,

Appellee.

APPENDIX TO BRIEF OF APPELLANT

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—9-17-54

No. 14330

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

LIBELANT'S EXHIBIT No. 1

In the United States District Court, Southern District of California, Central Division

No. 12633-T

OLYMPIC STEAMSHIP CO., INC., a Corporation,

Libelant,

vs.

ACE TRACTOR AND EQUIPMENT CO., INC., a Corporation,

Respondent.

PRE-TRIAL STIPULATION

It Is Stipulated, as follows:

I.

At all times mentioned in the libel the Ace Tractor and Equipment Co., Inc., was and it now is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the Southern District of California, Central Division.

II.

At all times mentioned in the libel the Olympic Steamship Co., Inc., was and it now is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in the Western District of Washington, Northern Division.

Libelant's Exhibit No. 1—(Continued)

III.

At all times mentioned in the libel the Olympic Steamship Co., Inc., was the Bare Boat Charterer of the SS "Edward A. Filene," a merchant vessel of the United States. Calvin H. Sides was employed by the Olympic Steamship Co., Inc., on said vessel as radio operator and seaman for a voyage commencing on or about the 1st day of June, 1948, at San Francisco, California, to Alaskan waters and return and said Calvin H. Sides sustained the bodily injuries referred to in the libel while taking part in the loading of cargo in one of the holds of said vessel during the course of said voyage. Ace Tractor and Equipment Co., Inc., reserves the right to prove that at the time of sustaining said bodily injuries Calvin H. Sides was an employee of said Ace Tractor and Equipment Co., Inc.

IV.

On or about May 28, 1948, Olympic Steamship Co., Inc., as Bare Boat Charterer and Ace Tractor and Equipment Co., Inc., as Voyage Charterer, entered into a Voyage Charter Party at San Francisco, California, wherein and whereby said Ace Tractor and Equipment Co., Inc., chartered said vessel, the SS "Edward A. Filene," for a voyage commencing on or about the 1st day of June, 1948, from San Francisco, California, to Alaskan waters and return. That said Voyage Charter Party provides, in part, as follows:

Libelant's Exhibit No. 1—(Continued)

"The Charterer agrees to provide and pay for workmen's compensation, job liability and other insurance required by law or custom upon stevedores or other workmen employed by or performing any of the duties of the Charterer hereunder at all ports or places of loading and discharging and will furnish the Owner, upon demand, a certificate of such insurance. The Charterer agrees to pay for all stevedore damage and to indemnify the Vessel and the Owner for any damage or expense caused by the act or neglect of the Charterer or its Agents or contractor appointed by the Charterer or performing any of its duties in the loading or discharging of the Vessel or from failure of equipment supplied by them."

V.

That on or about the 19th day of June, 1948, at about the hour of 2:30 p.m. on said day, said vessel was in navigable waters at Amchitka, Aleutian Islands, and the Ace Tractor and Equipment Co., Inc., a corporation, was in charge and control of the loading of cargo in the lower No. 4 hold of said vessel.

VI.

At all times mentioned in the libel the winch driver who was operating the loading gear attached to a wire cable in the lower No. 4 hold of said vessel was an employee of Ace Tractor and Equipment Co., Inc., and was acting in the course and scope of his employment as such winch driver.

Libelant's Exhibit No. 1—(Continued)

VII.

On said 19th day of June, 1948, a certain wire or steel cable, sometimes referred to as a "strap" and used in connection with the loading of said cargo, parted, thereby permitting a sling load of steel mats, weighing approximately 2,000 pounds, to swing and strike the said Calvin H. Sides with great force and violence and leaving him pinned under said sling load and at said time and place said Calvin H. Sides sustained injury as hereinabove set forth. At and about said time the said Calvin H. Sides was engaged in assisting in the loading of said cargo.

VIII.

That on or about the 18th day of January, 1949, the said Calvin H. Sides filed an action at law in the United States District Court, Western District of Washington, Northern Division, against the Olympic Steamship Co., Inc., alleging in said action that he, the said Calvin H. Sides, was an employee of said Olympic Steamship Co., Inc., on June 19th, 1948; that on said date when said vessel was at Amchitka, Aleutian Islands, loading cargo, the said Calvin H. Sides was then in the course of his employment in the lower No. 4 hold of said vessel, SS "Edward A. Filene"; that at said time and place said vessel was unseaworthy in that the wire cable installed in said hold to which the loading gear of said vessel was connected was defective and unable to support the weights for which it was intended;

Libelant's Exhibit No. 1—(Continued)

that the winch driver in the course of his employment carelessly and negligently operated said loading gear as to place an excessive strain on said wire cable; that as a direct and proximate result of the unseaworthiness of the vessel and the negligence of the said Olympic Steamship Co., Inc., as aforesaid, said wire cable parted, causing a sling load of steel mats, weighing in excess of 2,000 pounds, to swing and strike the said Calvin H. Sides with great force and violence and leaving him pinned under said sling load and as a direct and proximate result of the unseaworthiness of the said vessel and the negligence of the Olympic Steamship Co., Inc., as aforesaid, said Calvin H. Sides sustained severe and permanent injuries, as hereinabove set forth; that said Calvin H. Sides further alleged that at the time of receiving said injuries he was an able bodied man of the age of 39 years with a normal life expectancy of 28.90 years, capable of earning and actually earning the sum of $500.00 a month as a radio operator and seaman; that ever since said 19th day of June, 1948, said Calvin H. Sides has been and now is and for a long period of time in the future will be totally incapacited from following any gainful occupation; that his back and his left leg have been permanently injured and weakened; that the full extent of his injuries and disability is still unknown to him; that his ability to follow any gainful occupation has been permanently impaired; that he has suffered extreme pain in the past, now suffers and will suffer such pain in the future, to his total damage in the total sum of $50,000.00.

Libelant's Exhibit No. 1—(Continued)

IX.

On January 4, 1950, Ace Tractor and Equipment Co., Inc., by and through Raymond G. Stanbury, Esq., who at said time was acting as the agent of said Ace Tractor and Equipment Co., Inc., and in the course of his authority as such agreed that the case of Calvin H. Sides v. Olympic Steamship Co., Inc., then pending in the United States District Court, Western District of Washington, Northern Division, could be settled by Olympic Steamship Co., Inc., without prejudice to Ace Tractor and Equipment Co., Inc., by the payment by said Olympic Steamship Co., Inc., to said Calvin H. Sides of the sum of $14,000.00, and Ace Tractor and Equipment Co., Inc., agreed that said sum of $14,-000.00 was a fair and reasonable sum to be paid to said Calvin H. Sides, and said agreement was made by Ace Tractor and Equipment Co., Inc., in consideration of Messrs. Bogle, Bogle & Gates, attorneys of record for Olympic Steamship Co., Inc., in said action then pending in the United States District Court, Western District of Washington, Northern Division, hereinabove referred to, obtaining from said Calvin H. Sides a dismissal with prejudice of his action then pending in the Superior Court of the State of California in and for the County of Los Angeles, entitled Calvin H. Sides, Plaintiff, vs. Ace Tractor and Equipment Co., Inc., a corporation, being number 558,573 amongst the files of said Superior Court of the State of California, in and for the County of Los Angeles.

Libelant's Exhibit No. 1—(Continued)

X.

On the 16th day of January, 1950, with the written consent and approval of Ace Tractor and Equipment Co., Inc., as aforesaid, Olympic Steamship Co., Inc., settled and compromised the claim of said Calvin H. Sides against said Olympic Steamship Co., Inc., for the sum of $14,000.00, and upon receipt of said sum of $14,000.00, said Calvin H. Sides executed and delivered to Olympic Steamship Co., Inc., a receipt and release, by the terms of which said Calvin H. Sides did release, discharge and forever acquit the SS "Edward A. Filene," her agents, owners, officers and crew and charterers, Olympic Steamship Co., Inc., a corporation, and/or any and all other persons, firms or corporations having any interest in or connection with said SS "Edward A. Filene," of and from any and all claims, demands or charges of whatsoever nature, and from any and all damages, injuries, actions or causes of action either at law, in equity or admiralty, for negligence or otherwise, including claim for wages, maintenance and/or cure, arising out of or in connection with the accident sustained by said Calvin H. Sides on or about the 19th day of June, 1948, while he was employed as radio operator aboard said vessel, which said accident and injuries resulting therefrom were the subject matter of the action commenced by said Calvin H. Sides against Olympic Steamship Co., Inc., in said United States District Court, Western District of Washington, Northern Division, and for and in further considera-

Libelant's Exhibit No. 1—(Continued)

tion of the payment by Olympic Steamship Co., Inc., to said Calvin H. Sides of said sum of $14,000.00, the said Calvin H. Sides did also release, discharge and forever acquit the Ace Tractor and Equipment Co., Inc., its agents and owners and/or any and all other persons, firms or corporations having any interest in or connection with said Ace Tractor and Equipment Co., Inc., a corporation, of and from any and all claims, demands or charges of whatsoever nature and from any and all injuries, actions or causes of action, either at law, in equity or admiralty, for negligence or otherwise, including claim for wages, maintenance and/or cure arising out of or in connection with said accident hereinabove described, resulting in the injuries to said Calvin H. Sides, as hereinbefore described, and said Calvin H. Sides authorized his attorneys to dismiss with prejudice and without costs that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Calvin H. Sides, Plaintiff, vs. Ace Tractor and Equipment Co., Inc., a corporation, Defendant, No. 558,573, the basis of said action being the negligence of the Ace Tractor and Equipment Co., Inc., a corporation, which caused the accident and injuries, as described hereinabove; that the said dismissal with prejudice of the said action was entered in the records of said Superior Court on February 3, 1950.

XI.

That on March 29, 1949, Olympic Steamship Co., Inc., tendered to Ace Tractor and Equipment Co.,

Libelant's Exhibit No. 1—(Continued)

Inc., the defense of said action filed by the said Calvin H. Sides in said United States District Court, Western District of Washington, Northern Division, against said Olympic Steamship Co., Inc., and said Ace Tractor and Equipment Co., Inc., refused to accept the defense of said action on behalf of said Olympic Steamship Co., Inc.

XII.

That by reason of the relationship existing between Olympic Steamship Co., Inc., and said Calvin H. Sides, said Olympic Steamship Co., Inc., owed to said Calvin H. Sides the duty to provide him with a seaworthy vessel and appliances and a reasonably safe place to work.

XIII.

The allegations of Article Thirteenth in said libel will be admitted upon the submission for inspection of satisfactory written evidence of the payment of each of said items referred to therein.

Dated: January 11th, 1952.

/s/ LASHER B. GALLAGHER,
Proctor for Libelant.

LILLICK, GEARY & McHOSE,
By /s/ GORDON K. WRIGHT,
Proctors for Respondent Ace Tractor and Equipment Co., Inc.

[Endorsed]: Filed January 11, 1952.

Received in evidence January 12, 1954.

LIBELANT'S EXHIBIT No. 2

In the Superior Court of the State of California in and for the County of Los Angeles

No. 558573

CALVIN H. SIDES,

Plaintiff,

vs.

ACE TRACTOR AND EQUIPMENT CO., INC., a Corporation,

Defendant.

SUMMONS

The People of the State of California Send Greetings to:

Ace Tractor and Equipment Co., Inc., a corporation, Defendant.

You are directed to appear in an action brought against you by the above-named plaintiff ..... in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the ..... Complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff ..... will take judgment for any money or damages demanded in the ..... Complaint, as arising upon contract, or will apply

Libelant's Exhibit No. 2—(Continued)

to the Court for any other relief demanded in the ..... Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 15th day of April, 1949.

[Seal] HAROLD J. OSTLY,

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles;

By /s/ M. SCOTT,
Deputy.

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014, C. C. P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk.

[In Pencil]: Answer due May 4.

Libelant's Exhibit No. 2—(Continued)

In the Superior Court of the State of California
in and for the County of Los Angeles

No. .....

CALVIN H. SIDES,

Plaintiff,

vs.

ACE TRACTOR AND EQUIPMENT CO., INC., a Corporation,

Defendant.

COMPLAINT
(For Personal Injuries)

Comes now the plaintiff, and for cause of action against the above-named defendant, complains and alleges:

I.

That at all times hereinafter mentioned, the defendant Ace Tractor and Equipment Co., Inc., was a corporation organized and existing under and by virtue of the laws of one of the states of the United States, authorized to do business and actually doing business in the City and County of Los Angeles, State of California.

II.

That defendant was engaged in the moving of certain steel landing mats and heavy road equipment from Amchitka, Aleutian Islands, to ports of the United States; and in connection therewith made some arrangement with the Olympic Steamship

Libelant's Exhibit No. 2—(Continued)

Company, Inc., owner and operator of the SS Edward A. Filene, for the loading and transportation of said equipment, the exact terms of which are unknown to the plaintiff, whereby said Ace Tractor and Equipment Company, Inc., assisted in the loading of said steel mats aboard said vessel, supplying stevedores and winch drivers for said purpose.

III.

That on or about the 19th day of June, 1948, at about the hour of 2:30 p.m. when said vessel was at Amchitka, loading said steel mats, the defendant Ace Tractor and Equipment Company, Inc., and the Olympic Steamship Company, Inc., jointly rigged the gear of No. 4 hold, using a wire strap and snatch block on the port side of said hold to place said steel mats in the wing of said hold. That said gear was improperly rigged in that it caused excessive strain to be placed upon the strap of the snatch block, and that said improper rigging was known to the to the defendant Ace Tractor and Equipment Company, Inc., and the Olympic Steamship Company, Inc., and created a dangerous and hazardous condition for people employed in the hold. That the winch driver handling said load at said time, employed by the defendant Ace Tractor and Equipment Company, Inc., was incompetent to operate said winch and was known by both defendant Ace Tractor and Equipment Company, Inc., and Olympic Steamship Company, Inc., to be incompetent; that said winch driver, in attempting to

Libelant's Exhibit No. 2—(Continued)

place a load of steel mats in said hold carelessly and negligently placed an excessive strain on the strap and snatch block, causing both winches to pull against said snatch block. At said time and place, the plaintiff Calvin H. Sides was in said hold in the course of his employment for the Olympic Steamship Company, Inc. That as a direct and proximate result of the joint negligence of the defendant and the Olympic Steamship Company, Inc., the strap holding snatch block parted, causing the load of steel mats weighing approximately 2,000 pounds to swing across and strike the plaintiff.

IV.

That as a direct and proximate result of the negligence of the defendant Ace Tractor and Equipment Company, Inc., combined with the negligence of the Olympic Steamship Company, Inc., plaintiff received a severe injury to the muscles and bones of his back, severe shock, a comminuted fracture of his left fibula, with severe displacement of fragments, a comminuted fracture of his left tibia, with severe displacement of fragments; that he developed an infection in his left fibula, left tibia and bones of his left ankle and foot. That as a result of said injury, he devloped a circulatory disorder in his left leg and thigh which necessitated the performance of a sympathectomy operation. That ever since said date and until January 29, 1949, plaintiff was hospitalized for the treatment of his condition and will require hospitalization in the future; that at

Libelant's Exhibit No. 2—(Continued)

the time of receiving said injuries, plaintiff was an able-bodied man of the age of 39 years with a normal life expectance of 28.90 years, capable of earning and actually earning the sum of Five Hundred Dollars ($500.00) a month as a radio operator and seaman; that ever since said date, plaintiff has been and now is and for a long period of time in the future will be totally incapacitated from following any gainful occupation; that his back, his left leg has been permanently injured and weakened; that the full extent of plaintiff's injuries and disability is still to the plaintiff unknown; that his ability to follow any gainful occupation has been permanently impaired; that he has suffered extreme pain in the past, now suffers, and will suffer such pain in the future, to his total damage in the total sum of Fifty Thousand Dollars ($50,000.00).

Wherefore, plaintiff prays for judgment against the defendant in the sum of Fifty Thousand Dollars ($50,000.00), and for his costs and disbursements herein incurred.

LEVINSON & FRIEDMAN, and

DEE B. TANNER,

By /s/ DEE B. TANNER,

Attorneys for Plaintiff.

Received in evidence January 12, 1954.

LIBELANT'S EXHIBIT No. 3

In the Superior Court of the State of California
in and for the County of Los Angeles
No. 558,573

CALVIN H. SIDES,

Plaintiff,

vs.

ACE TRACTOR AND EQUIPMENT CO., INC., a Corporation,

Defendant.

SEPARATE ANSWER OF DEFENDANT ACE TRACTOR AND EQUIPMENT CO., INC., A CORPORATION

Comes Now the defendant, Ace Tractor and Equipment Co., Inc., a corporation, and answering plaintiff's complaint, admits, denies and alleges as follows:

I.

Answering Paragraph II, admits that it made certain arrangements with the Olympic Steamship Company, Inc., for the loading and transportation of certain equipment but denies generally and specifically each and every other allegation of said paragraph.

II.

Denies generally and specifically each and every allegation of Paragraphs III and IV.

III.

Defendant lacks information or belief sufficient to enable it to answer the allegations concerning plaintiff's alleged injuries, damages and losses and basing its denial upon said lack of information and

belief denies each and all thereof generally and specifically and on said ground denies that plaintiff was injured or damaged as alleged or at all.

IV.

Denies that this defendant was careless or negligent as alleged or at all.

Special Affirmative Defense

I.

For a Further, Separate and Affirmative Defense to Plaintiff's Alleged Cause of Action, This Defendant Alleges:

That the facts of plaintiff's participation, if any, in the events alleged in his complaint are at this time unknown to defendant; that when said facts are ascertained defendant will ask leave of court to amend its answer in any respect which may become material.

Wherefore, this defendant prays that plaintiff take nothing herein and that this defendant be awarded its costs of suit herein incurred.

PARKER, STANBURY & REESE,

By RAYMOND G. STANBURY,

Attorneys for Defendant, Ace Tractor and Equipment Co., Inc., a Corporation.

Verif by Lee Brunnell, Vice Pres., 5/4/49, before Mot.

Aff. of mailing 5/4/49, before Mot.

Received in evidence January 12, 1954.

LIBELANT'S EXHIBIT No. 4

(Copy)

Bogle, Bogle & Gates
6th Floor, Central Building
Seattle 4

March 22, 1949.

Ace Tractor & Equipment Co., Inc.,
Southgate, California.

Re: Calvin H. Sides v. Olympic Steamship Co., Inc., SS "Edward A. Filene."

Gentlemen:

On behalf of the Olympic Steamship Co., Inc., owners of the above vessel, we desire to advise you that Calvin H. Sides, a Radio Operator on the vessel, has instituted an action against the Olympic Steamship Co., Inc., in the United States District Court, Western District of Washington, Northern Division, being Civil Action No. 2179, seeking recovery of damages for an injury received to his back, left leg and foot, on or about June 19, 1948, when your agents, servants and employees in the course of loading cargo into No. 4 lower hold of the vessel, caused a portion of the gear supplied by you to part. This resulted from the negligence of a young and inexperienced winch driver employed by you to operate the winches at this particular hatch.

Sides is seeking recovery of $50,000.00 damages.

Our investigation indicates that although the gear and rigging supplied by the ship for your use was in perfect condition, your winch driver caused the

gear to become tight-lined, resulting in the breaking of a steel strap in the lower hold. The portion of cargo which was being loaded at the moment then swung across the lower hold of the vessel, striking Sides and causing the injuries above mentioned.

Our investigation further discloses that although Sides was the radio operator aboard the vessel, he was, at the time of this loading at Amchitka, Alaska, employed by you for stevedoring operations.

Further, we call your attention to Paragraph 2 (c) of the Voyage Charter Party, executed between yourselves and the Olympic Steamship Co., Inc., on May 28, 1948:

> "(c) The Charterer agrees to provide and pay for workmen's compensation, job liability and other insurance required by law or custom upon stevedores or other workmen employed by or performing any of the duties of the Charterer hereunder at all ports or places of loading and discharging and will furnish the Owner upon demand a certificate of such insurance. The Charterer agrees to pay for all stevedore damage and to indemnify the Vessel and the Owner for any damage or expense caused by the act or neglect of the Charterer of its Agents or contractors appointed by the Charterer or performing any of its duties in the loading or discharging of the Vessel or from failure of equipment supplied by them."

In view of these facts and on behalf of Olympic Steamship Co., Inc., bareboat chartered owners of

the SS "Edward A. Filene," we hereby tender you the defense of this pending action.

We enclose copies of the complaint and the answer which we have filed for your information. We shall be pleased to make our file available for your attorneys or yourselves for inspection.

In the event you fail to accept this tender of defense, please be advised that the Olympic Steamship Co., Inc., will be obliged to look to you for reimbursement for any judgment obtained in this matter against Olympic Steamship Co., Inc., and for the costs of conducting the defense to the action, including a reasonable attorneys' fee in the matter.

Would you be good enough to advise us if you will accept this tender of defense, so we may proceed accordingly?

Very truly yours,

BOGLE, BOGLE & GATES,

By /s/ ROBERT V. HOLLAND,

Encl.

Received April 1, 1949.

Received in evidence January 12, 1954.

LIBELANT'S EXHIBIT No. 5

May 20, 1949.

Messrs. Bogle, Bogle & Gates,
6th Floor, Central Building,
Seattle 4, Washington.

Re: Sides v. Ace Tractor and Equipment Co., Inc.

Gentlemen:

We are the attorneys for the Ace Tractor and Equipment Company and as such have had referred to us your demand, dated March 22, 1949, that it accept the defense of the case brought against your client, Olympic Steamship Co., by Calvin H. Sides, which action is number 2179 in the United States District Court, Western District of Washington, Northern Division. We have advised our client that it has no obligation to defend that action under the terms of the "Voyage Charter Party" to which you refer and your demand is therefore respectfully declined.

Very truly yours,

PARKER, STANBURY & REESE,

By RAYMOND G. STANBURY.

RGS:HC

cc. Messrs. Cannon & Callister.
cc. Messers. Levinson & Friedman and Dee B. Tanner.

Received in evidence January 12, 1954.

LIBELANT'S EXHIBIT No. 6

Bogle, Bogle & Gates
6th Floor, Central Building,
Seattle 4, Washington

December 10, 1949.

Registered
Return Receipt Requested
Ace Tractor & Equipment Company, Inc.,
5210 East Firestone Boulevard,
South Gate, California.
Attention: Mr. B. Shea.

Re: Calvin H. Sides v. Olympic Steamship Co., Inc.

Gentlemen:

On March 29, 1949, we tendered the defense of the above lawsuit to you through Mr. Murray H. Roberts of Wilmington, California. This tender was rejected in a letter from Messrs. Parker, Stanbury & Reese under date of May 20, 1949.

We now enclose a copy of a letter we have received from Messrs. Levinson & Friedman setting forth a $20,000.00 demand. We believe it is possible that this figure may be altered downward as the trial date of January 3, 1950, approaches.

We might advise that we have available for the trial by deposition and in person the various crewmen and Ace Tractor longshoremen who were working in the hold at the time of Sides' injury. These men all state that the particular strap which broke was one supplied by Ace Tractor & Equipment Company and they also state that the Ace Tractor winch

driver who tight-lined the load, causing the strap to break, was obviously inexperienced.

Would you kindly send us immediately your instructions for further disposition of this matter? We might advise that we would be willing to recommend to our principals that a small contribution be made to any settlement which you may deem fit to direct.

Very truly yours,

BOGLE, BOGLE & GATES,

By ROBERT V. HOLLAND.

Encl.

cc. Messrs. Parker, Stanbury & Rees (Registered).

[Envelope]

[Cancelled U. S. Postage Stamps.]

[Return Address.]

Bogle, Bogle & Gates,
6th Floor, Central Building,
Seattle 4, Washington.

Registered-Return Receipt Requested.

[Addressed to]:

Messrs. Parker, Stanbury & Reese,
1217 Foreman Building,
707 South Hill Street,
Los Angeles 14, California.

[Stamped]: Return Receipt Requested.

[Stamped]: Registered No. 31273.

[Postmarked]: Seattle Washington, Dec. 10, 1949.
Los Angeles, Calif., Dec. 12, 1949.

Received in evidence January 14, 1954.

No. 14,330

United States Court of Appeals

For the Ninth Circuit

ACE TRACTOR & EQUIPMENT CO., INC.,
Appellant,

vs.

OLYMPIC STEAMSHIP CO., INC.,
Appellee.

APPELLEE'S REPLY BRIEF.

LASHER B. GALLAGHER,
1256 West First Street, Los Angeles 26, California,
Proctor for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Texts

No. 14,330

United States Court of Appeals
For the Ninth Circuit

ACE TRACTOR & EQUIPMENT CO., INC.,
Appellant,

vs.

OLYMPIC STEAMSHIP CO., INC.,
Appellee.

APPELLEE'S REPLY BRIEF.

PREFATORY STATEMENT.

Appellant attempts to make the point that "Olympic made payment to Calvin H. Sides as a volunteer and thus is not entitled to indemnity." (Appellant's Opening Brief, p. 18.)

Appellee is quite surprised by this contention of appellant. The undersigned proctor had personal knowledge and recollection of what had occurred during the oral argument in the trial Court and believed that he had the right to assume that the Appellant would not assert, in the United States Court of Appeals, anything contrary to the position the Ace Tractor & Equipment Company took in the Court below. For that reason Appellee did not insist upon the oral

argument presented to the trial judge being included within the record on appeal.

Under the circumstances shown by the actual record as made in the trial Court, and the contrary position taken by the Appellant in its brief filed in the office of the clerk of this Honorable Court, Appellee feels more than justified in quoting from the record as shown by the reporter's transcript of the proceedings at the oral argument presented to the trial judge. If the Appellant denies that its statements to the trial Court are not accurately set forth herein, Appellee will take the necessary steps to make the oral argument a part of the record on appeal.

Gordon H. Wright, Esq., Appellant's proctor who tried the case in the trial Court, in the course of his argument after the introduction of all of the evidence, stated to the trial judge, as follows:

> "I submit, your Honor, that here is a case in which the ship owner clearly had a duty to its employees to provide a safe and seaworthy place in which to work. There is no question but what there was liability on the part of the vessel owner, in the first instance.
>
> * * * * * * *
>
> "With regard to State Steamship Co. v. Rothschild case Mr. Gallagher would say he is entitled to indemnification on the basis of that case. I think the State Steamship Co. case does establish the proposition which Mr. Gallagher is arguing here, that is, if he can prove that the stevedores were responsible for the injury, that then they can recover."

Because of the standing at the bar of proctors for Appellant, Appellee believes that the attempt of Appellant to assert a point in its opening brief on appeal, contrary to statements and concessions made by its proctor in the trial Court, is the result of inadvertence and a failure on the part of the author of Appellant's brief to remember what occurred during the course of the trial and particularly what was said during the oral argument of its proctor.

STATEMENT OF THE CASE.

On May 28, 1948, at San Francisco, California, the Olympic Steamship Company and Ace Tractor and Equipment Company entered into a voyage charter party. Said charter party was offered in evidence by Ace Tractor and Equipment Company and was marked in the Court below as Respondent's Exhibit B.

Said charter party provides, in part, as follows:

> "F. Stevedoring: Loading, stowing, trimming and discharging expenses to be for Charterer's account.
>
> * * * * * * *
>
> "I. Special provisions: * * *
>
> 2. Overtime to Vessel's crew in connection with loading and discharging of cargo to be for Charterer's account. * * *
>
> 5. At loading port, Charterers to use crew members for loading vessel, and payment to be made by Charterers in accordance with Owners' Alaska Labor Agreements." (Respondent's Exhibit B, p. 1.)

"The Vessel will permit the use of ship's winches and other appropriate gear actually on board. The Vessel will at all times provide power sufficient to run all the winches, or all necessary to be worked. * * *". (Respondent's Exhibit B, p. 2.)

Libelant's Exhibit No. 1, in the Court below, is a "Pre-Trial Stipulation."

Said stipulation was introduced in evidence without any objection of any kind or character by Appellant. (Record pp. 51-52.)

Said Pre-Trial Stipulation reads as follows:

"It is Stipulated, as follows:

I.

At all times mentioned in the libel the Ace Tractor and Equipment Co., Inc., was and it now is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the Southern District of California, Central Division.

II.

At all times mentioned in the libel the Olympic Steamship Co., Inc., was and it now is a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business in the Western District of Washington, Northern Division.

III.

At all times mentioned in the libel the Olympic Steamship Co., Inc., was the Bare Boat Charterer

of the SS 'Edward A. Filene,' a merchant vessel of the United States. Calvin H. Sides was employed by the Olympic Steamship Co., Inc., on said vessel as radio operator and seaman for a voyage commencing on or about the 1st day of June, 1948, at San Francisco, California, to Alaskan waters and return and said Calvin H. Sides sustained the bodily injuries referred to in the libel while taking part in the loading of cargo in one of the holds of said vessel during the course of said voyage. Ace Tractor and Equipment Co., Inc., reserves the right to prove that at the time of sustaining said bodily injuries Calvin H. Sides was an employee of said Ace Tractor and Equipment Co., Inc.

IV.

On or about May 28, 1948, Olympic Steamship Co., Inc., as Bare Boat Charterer and Ace Tractor and Equipment Co., Inc., as Voyage Charterer, entered into a Voyage Charter Party at San Francisco, California, wherein and whereby said Ace Tractor and Equipment Co., Inc., chartered said vessel, the SS 'Edward A. Filene,' for a voyage commencing on or about the 1st day of June, 1948, from San Francisco, California, to Alaskan waters and return. That said Voyage Charter Party provides, in part, as follows:

'The Charterer agrees to provide and pay for workmen's compensation, job liability and other insurance required by law or custom upon stevedores or other workmen employed by or performing any of the duties of the Charterer hereunder at all ports or places of loading and discharging and will furnish the Owner, upon demand, a cer-

tificate of such insurance. The Charterer agrees to pay for all stevedore damage and to indemnify the Vessel and the Owner for any damage or expense caused by the act or neglect of the Charterer or its Agents or contractor appointed by the Charterer or performing any of its duties in the loading or discharging of the Vessel or from failure of equipment supplied by them.'

V.

That on or about the 19th day of June, 1948, at about the hour of 2:30 p.m. on said day, said vessel was in navigable waters at Amchitka, Aleutian Islands, *and the Ace Tractor and Equipment Co.,* Inc., a corporation, *was in charge and control of the loading of cargo in the lower No. 4 hold of said vessel.*

VI.

At *all* times mentioned in the libel *the winch driver* who was operating the *loading gear attached to a wire cable in the lower No. 4 hold* of said vessel was an employee of Ace Tractor and Equipment Co., Inc., and *was acting in the course and scope of his employment as such winch driver.*

VII.

On said 19th day of June, 1948, a certain wire or steel cable, sometimes referred to as a 'strap' and *used in connection with the loading of said cargo,* parted, thereby permitting a sling load of steel mats, weighing approximately 2,000 pounds, to swing and strike the said Calvin H. Sides with great force and violence and leaving him pinned

under said sling load and at said time and place said Calvin H. Sides sustained injury as hereinabove set forth. At and about said time the said Calvin H. Sides was engaged in assisting in the loading of said cargo.

VIII.

That on or about the 18th day of January, 1949, the said Calvin H. Sides filed an action at law in the United States District Court, Western District of Washington, Northern Division, against the Olympic Steamship Co., Inc., alleging in said action that he, the said Calvin H. Sides, was an employee of said Olympic Steamship Co., Inc., on June 19th, 1948; that on said date when said vessel was at Amchitka, Aleutian Islands, loading cargo, the said Calvin H. Sides was then in the course of his employment in the lower No. 4 hold of said vessel, SS 'Edward A. Filene'; that at said time and place said vessel was unseaworthy in that the wire cable installed in said hold to which the loading gear of said vessel was connected was defective and unable to support the weights for which it was intended; that the winch driver in the course of his employment carelessly and negligently operated said loading gear as to place an excessive strain on said wire cable; that as a direct and proximate result of the unseaworthiness of the vessel and the negligence of the said Olympic Steamship Co., Inc., as aforesaid, said wire cable parted, causing a sling load of steel mats, weighing in excess of 2,000 pounds, to swing and strike the said Calvin H. Sides with great force and violence and leaving him pinned

under said sling load and as a direct and proximate result of the unseaworthiness of the said vessel and the negligence of the Olympic Steamship Co., Inc., as aforesaid, said Calvin H. Sides sustained severe and permanent injuries, as hereinabove set forth; that said Calvin H. Sides further alleged that at the time of receiving said injuries he was an able bodied man of the age of 39 years with a normal life expectancy of 28.90 years, capable of earning and actually earning the sum of $500.00 a month as a radio operator and seaman; that ever since said 19th day of June, 1948, said Calvin H. Sides has been and now is and for a long period of time in the future will be totally incapacitated from following any gainful occupation; that his back and his left leg have been permanently injured and weakened; that the full extent of his injuries and disability is still unknown to him; that his ability to follow any gainful occupation has been permanently impaired; that he has suffered extreme pain in the past, now suffers and will suffer such pain in the future, to his total damage in the total sum of $50,000.00.

IX.

On January 4, 1950, Ace Tractor and Equipment Co., Inc., by and through Raymond G. Stanbury, Esq., who at said time was acting as the agent of said Ace Tractor and Equipment Co., Inc., and in the course of his authority as such agreed that the case of Calvin H. Sides v. Olympic Steamship Co., Inc., then pending in the United States District Court, Western District of Wash-

ington, Northern Division, could be settled by Olympic Steamship Co., Inc., without prejudice to Ace Tractor and Equipment Co., Inc., by the payment by said Olympic Steamship Co., Inc., to said Calvin H. Sides of the sum of $14,000.00, and Ace Tractor and Equipment Co., Inc., agreed that said sum of $14,000.00 was a fair and reasonable sum to be paid to said Calvin H. Sides, and said agreement as made by Ace Tractor and Equipment Co., Inc., in consideration of Messrs. Bogle, Bogle & Gates, attorneys of record for Olympic Steamship Co., Inc., in said action then pending in the United States District Court, Western District of Washington, Northern Division, hereinabove referred to, obtaining from said Calvin H. Sides a dismissal with prejudice of his action then pending in the Superior Court of the State of California in and for the County of Los Angeles, entitled Calvin H. Sides, Plaintiff, vs. Ace Tractor and Equipment Co., Inc., a corporation, being number 558,573 amongst the files of said Superior Court of the State of California, in and for the County of Los Angeles.

X.

On the 16th day of January, 1950, with the written consent and approval of Ace Tractor and Equipment Co., Inc., as aforesaid, Olympic Steamship Co., Inc., settled and compromised the claim of said Calvin H. Sides against said Olympic Steamship Co., Inc., for the sum of $14,000.00, and upon receipt of said sum of $14,000.00, said Calvin H. Sides executed and delivered to Olympic Steamship Co., Inc., a receipt and release, by the

terms of which said Calvin H. Sides did release, discharge and forever acquit the SS 'Edward A. Filene,' her agents, owners, officers and crew and charterers, Olympic Steamship Co., Inc., a corporation, and/or any and all other persons, firms or corporations having any interest in or connection with said SS 'Edward A. Filene,' of and from any and all claims, demands or charges of whatsoever nature, and from any and all damages, injuries, actions or causes of action either at law, in equity or admiralty, for negligence or otherwise, including claim for wages, maintenance and/or cure, arising out of or in connection with the accident sustained by said Calvin H. Sides on or about the 19th day of June, 1948, while he was employed as radio operator aboard said vessel, which said accident and injuries resulting therefrom were the subject matter of the action commenced by said Calvin H. Sides against Olympic Steamship Co., Inc., in said United States District Court, Western District of Washington, Northern Division, and for and in further consideration of the payment by Olympic Steamship Co., Inc., to said Calvin H. Sides of said sum of $14,000.00, the said Calvin H. Sides did also release, discharge and forever acquit the Ace Tractor and Equipment Co., Inc., its agents and owners and/or any and all other persons, firms or corporations having any interest in or connection with said Ace Tractor and Equipment Co., Inc., a corporation, of and from any and all claims, demands or charges of whatsoever nature and from any and all injuries, actions or courses of action, either at law, in equity or admiralty, for negligence or

otherwise, including claim for wages, maintenance and/or cure arising out of or in connection with said accident hereinabove described, resulting in the injuries to said Calvin H. Sides, as hereinbefore described, and said Calvin H. Sides authorized his attorneys to dismiss with prejudice and without costs that certain action in the Superior Court of the State of California, in and for the County of Los Angeles, entitled Calvin H. Sides, Plaintiff, vs. Ace Tractor and Equipment Co., Inc., a corporation, Defendant, No. 558,573, *the basis of said action being the negligence of the Ace Tractor and Equipment Co.,* Inc., a corporation, *which caused the accident and injuries, as described hereinabove;* that the said dismissal with prejudice of the said action was entered in the records of said Superior Court on February 3, 1950.

XI.

That on March 29, 1949, Olympic Steamship Co., Inc., tendered to Ace Tractor and Equipment Co., Inc., the defense of said action filed by the said Calvin H. Sides in said United States District Court, Western District of Washington, Northern Division, against said Olympic Steamship Co., Inc., and said Ace Tractor and Equipment Co., Inc., refused to accept the defense of said action on behalf of said Olympic Steamship Co., Inc.

XII.

That by reason of the relationship existing between Olympic Steamship Co., Inc., and said Calvin H. Sides, said Olympic Steamship Co.,

Inc., owed to said Calvin H. Sides the duty to provide him with a seaworthy vessel and appliances and a reasonably safe place to work.

XIII.

The allegations of Article Thirteenth in said libel will be admitted upon the submission for inspection of satisfactory written evidence of the payment of each of said items referred to therein.

Dated: January 11th, 1952.

/s/ Lasher B. Gallagher,
Proctor for Libelant.
Lillick, Geary & McHose,
By /s/ Gordon K. Wright,
Proctors for Respondent Ace Tractor and Equipment Co., Inc."

(Appendix to brief of Appellant pp. 173-181; emphasis added.)

Documentary evidence introduced during the course of the trial consists of the following: Libelant's Exhibit No. 4, Libelant's Exhibit No. 5, Libelant's Exhibit No. 6, and Respondent's Exhibits C, D and E.

Libelant's Exhibit 4 is a letter dated March 22, 1949 addressed and delivered to Ace Tractor and Equipment Company wherein Messrs. Bogle, Bogle & Gates, on behalf of the Olympic Steamship Company, made certain accusatory statements of fact to Appellant.

Said letter reads, in full, as follows:

"Bogle, Bogle & Gates
6th Floor, Central Building
Seattle 4

March 22, 1949.

Ace Tractor & Equipment Co., Inc.,
Southgate, California.

Re: Calvin H. Sides v. Olympic Steamship Co., Inc., SS 'Edward A. Filene.'

Gentlemen:

On behalf of the Olympic Steamship Co., Inc., owners of the above vessel, we desire to advise you that Calvin H. Sides, a Radio Operator on the vessel, has instituted an action against the Olympic Steamship Co., Inc., in the United States District Court, Western District of Washington, Northern Division, being Civil Action No. 2179, seeking recovery of damages for an injury received to his back, left leg and foot, on or about June 19, 1948, *when your agents, servants and employees in the course of loading cargo into No. 4 lower hold of the vessel, caused a portion of the gear supplied by you* to part. This resulted from the *negligence* of a *young and inexperienced winch driver* employed by you to operate the winches at this particular hatch.

Sides is seeking recovery of $50,000.00 damages.

Our investigation indicates that although the gear and rigging supplied by the ship for your use was in *perfect* condition, *your* winch driver *caused the gear* to become *tight-lined,* resulting in the breaking of a steel strap in the lower hold.

The portion of cargo which was being loaded at the moment then swung across the lower hold of the vessel, striking Sides and causing the injuries above mentioned.

Our investigation further discloses that although Sides was the radio operator aboard the vessel, he was, at the time of this loading at Amchitka, Alaska, employed by you for stevedoring operations.

Further, we call your attention to Paragraph 2 (c) of the Voyage Charter Party, executed between yourselves and the Olympic Steamship Co., Inc., on May 28, 1948:

'(c) The Charterer agrees to provide and pay for workmen's compensation, job liability and other insurance required by law or custom upon stevedores or other workmen employed by or performing any of the duties of the Charterer hereunder at all ports or places of loading and discharging and will furnish the Owner upon demand a certificate of such insurance. The Charterer agrees to pay for all stevedore damage and to indemnify the Vessel and the Owner for any damage or expense caused by the act or neglect of the Charterer or its Agents or contractors appointed by the Charterer or performing any of its duties in the loading or discharging of the Vessel or from failure of equipment supplied by them.'

In view of these facts and on behalf of Olympic Steamship Co., Inc., bareboat chartered owners of the SS 'Edward A. Filene', we hereby tender you the defense of this pending action.

We enclose copies of the complaint and the answer which we have filed for your information. We shall be pleased to make our file available for your attorneys or yourselves for inspection.

In the event you fail to accept this tender of defense, please be advised that the Olympic Steamship Co., Inc., will be obliged to look to you for reimbursement for any judgment obtained in this matter against Olympic Steamship Co., Inc., and for the costs of conducting the defense to the action, including a reasonable attorneys' fee in the matter.

Would you be good enough to advise us if you will accept this tender of defense, so we may proceed accordingly?

Very truly yours,

Bogle, Bogle & Gates,
By /s/ Robert V. Holland,

Encl."

(Appendix to Brief of Appellant, pp. 190-192; emphasis added.)

The only answer made by Ace Tractor & Equipment Company to the said letter of March 22, 1949, is libelant's exhibit No. 5. Said exhibit reads as follows:

"May 20, 1949.

Messrs. Bogle, Bogle & Gates,
6th Floor, Central Building,
Seattle 4, Washington.

Re: Sides v. Ace Tractor and Equipment Co., Inc.

Gentlemen:

We are the attorneys for the Ace Tractor and Equipment Company and as such have had re-

ferred to us your demand, dated March 22, 1949, that it accept the defense of the case brought against your client, Olympic Steamship Co., by Calvin H. Sides, which action is number 2179 in the United States District Court, Western District of Washington, Northern Division. We have advised our client that it has no obligation to defend that action under the terms of the 'Voyage Charter Party' to which you refer and your demand is therefore respectfully declined.

Very truly yours,
Parker, Stanbury &
Reese,
By Raymond G. Stanbury.

RGS:HC
cc: Messrs. Cannon & Callister.
cc. Messrs. Levinson & Friedman and Dee B. Tanner."

(Appendix to Brief of Appellant, p. 193.)

Libelant's Exhibit No. 6 is another letter written by Messrs. Bogle, Bogle & Gates to Ace Tractor and Equipment Company under date of December 10, 1949. Said letter reads as follows:

"Bogle, Bogle & Gates
6th Floor, Central Building,
Seattle 4, Washington

December 10, 1949.

Registered
Return Receipt Requested

Ace Tractor & Equipment Company, Inc.,
5210 East Firestone Boulevard,
South Gate, California
Attention: Mr. B. Shea

Re: Calvin H. Sides v. Olympic Steamship Co., Inc.

Gentlemen:

On March 29, 1949, we tendered the defense of the above lawsuit to you through Mr. Murray H. Roberts of Wilmington, California. This tender was rejected in a letter from Messrs. Parker, Stanbury & Reese under date of May 20, 1949.

We now enclose a copy of a letter we have received from Messrs. Levinson & Friedman setting forth a $20,000.00 demand. We believe it is possible that this figure may be altered downward as the trial date of January 3, 1950, approaches.

We might advise that we have available for the trial by deposition and in person the various crewmen and Ace Tractor longshoremen who were working in the hold at the time of Sides' injury. *These men all state* that the *particular* strap which broke was *one supplied by Ace Tractor & Equipment Company* and they *also* state that *the Ace Tractor winch driver* who *tight-lined the load,* causing the strap to break, was *obviously inexperienced.*

Would you kindly send us immediately your instructions for further disposition of this matter? We might advise that we would be willing to recommend to our principals that a small contribution be made to any settlement which you may deem fit to direct.

Very truly yours,

Bogle, Bogle & Gates
By Robert V. Holland.

Encl.
cc. Messrs. Parker, Stanbury & Reese
(Registered)."

(Appendix to Brief of Appellant, pp. 194-195; emphasis added.)

Ace Tractor & Equipment Company made no answer whatever to Libelant's Exhibit No. 6.

Respondent also introduced as its evidence the said letter of December 10, 1949, as Respondent's Exhibit D. Said Exhibit D sets forth a copy of the letter of Levinson & Friedman referred to in Libelant's Exhibit No. 6. The third letter which is a part of Respondent's Exhibit D reads as follows:

"Law Offices
Cannon & Callister
650 South Spring Street
Los Angeles 14

December 16, 1949

Raymon G. Stanbury, Esq.
Parker, Stanbury & Reese
707 South Hill Street
Los Angeles 14, California

In re: Calvin H. Sides vs. Olympic
Steamship Co., Inc.

Dear Ray:

The enclosed letter has been forwarded to me by the Ace Tractor & Equipment Company.

Since you are handling this matter, will you kindly make what reply, if any, is necessary to this letter on behalf of the Ace Tractor & Equipment Company.

Very truly yours,

/s/ Reed E. Callister
Reed E. Callister
Of Cannon & Callister

REC/S
Encl. 1"

The only answer made by or on behalf of Ace Tractor & Equipment Company to any of the foregoing letters written to it was the letter of May 20, 1949 written by Raymond G. Stanbury as attorney for Ace Tractor & Equipment Company. (Record p. 159, Recross Examination of Raymond G. Stanbury; testimony of Lee R. Brunell, President of Ace Tractor & Equipment Company, Record pp. 98-112.)

Respondent's Exhibit C consists of a letter written by Olympic Steamship Company to Ace Tractor & Equipment Company, dated July 8, 1948. This letter reads, in part, as follows:

> "In accordance with terms of Charter Party, dated May 28, 1948, at San Francisco, between Ace Tractor & Equipment Co., and the Olympic Steamship Co., Inc., we are attaching hereto invoice covering *crew overtime paid for work performed* which was *directly connected with the cargo operation.*
>
> In support of this invoice, you will find attached thereto, copies of overtime sheets itemizing the actual hours worked and bearing the signature of your representative indicating authorization and acceptance of the time as being worked for your account.
>
> This invoice covers up to and including loading time at Amchitka. The balance of the crew work falling into this category will be billed in the near future, after such hours have been checked and approved by your representative. * * *" (Emphasis added.)

A full and fair resume of the testimony is as follows:

Deposition of Gene Southerland.

"Q. Will you state your name, please?
A. Gene Southerland.
* * * * * * *
Q. What is your occupation?
A. Seaman, winch driver.
Q. How long have you been going to sea?

A. About 15, 16 years.

Q. Have you followed the sea most of your working career?

A. Waterfront since I was just a kid.

Q. I see. Have you done other work on the waterfront other than as a seaman?

A. Walking boss, winch driver, work in the hold.

* * * * * * *

Q. Did you ever serve aboard the Edward A. Filene?

A. You mean as a crew member? Not as a crew member.

Q. Let me correct that. Did you ever work aboard the Edward A. Filene?

A. Yes.

* * * * * * *

Q. Mr. Southerland, on June 19, 1948, a seaman aboard the Edward A. Filene was injured at Amchitka, Alaska. Will you state whether or not you were present at that time?

A. Yes, sir. I was walking boss for the Ace Tractor Company at the time.

Q. And what was the ship doing at Amchitka?

A. It came in there to take a load of scrap.

Q. What type of scrap?

A. Well, it run everything. It was about 5,000 ton of landing mats, and there was all kinds of vehicles, trucks, and jeeps, tractors, trailers, and then just general and broken stuff, you know.

Q. And would you state again the name of your employer at that port?

A. Ace Tractor Company.

Q. And who are they and what were they doing there?

A. Well, they owned the—or bought the junk, and they employed me in Anchorage to come to Amchitka and load this load of junk on the ship.

Q. I see. By whom was the Edward A. Filene operated at that time?

A. You mean the company?

Q. Yes.

A. Oh, Olympic Steam, I think.

Q. And what was the name of your job that you took? What were you called?

A. Well, I was the loading boss. I was in charge of all loading operations.

Q. In what way did information of this injury to Seaman Calvin Sides come to your attention?

A. Well, I was just coming out of No. 3—I think it was No. 3 hold, now—just come on deck; and they hollered, 'Someone got hurt in No. 4.' So I run back there right away.

* * * * * * *

Q. How many loads were being worked on the vessel on or about the time of the accident?

A. Oh, there was 2, 3, 4 and 5 being worked.

Q. What duties did you have in regard to the work in those holds that you named?

A. I was in charge of loading all the hatches, and the sailors' hatch, which was No. 2—see, I would tell the mate what I had coming, how I wanted it stowed, and he would, in turn, tell the sailors. Only on occasions I would go down there and maybe change something.

Q. What officer on the ship had any duty in regard to the over-all loading and stowage of cargo?

A. Well, the skipper and the chief mate. Naturally, they have.

* * * * * * *

Q. In your job as loading boss, did you have any supervision over any of the workmen on the vessel?

A. All of them, yes.

Q. And about how many of them worked under you?

A. Well, let's see. Aboard ship, I would say there was about 40—not counting the mates or the Old Man. I think about 40, between 40 and 45 men, I would say.

Q. How long a period of time before you heard of the accident had you been in the vicinity of the No. 4 hatch?

A. Well, it is kind of—it's been so long, it's a little hard to say exactly. See, I went from hatch to hatch all the time, and maybe I had been down in 5, or something, and maybe in 4, you know—it's so long ago, it is really hard to say just exactly when I did leave that hatch the last time.

Q. At the time you last had observed any work being done at the No. 4 hatch, what was going on there?

A. Well, they were flooring off.

Q. What does that mean?

A. Well, we had, roughly, I would say, 5,000 ton of this landing mat, which had been bundled up, and we were flooring off and winging up tier for tier, just saving head room for our other vehicles, you see, to go on—vehicles and stuff like that, that we could roll, to go on top of this landing mat.

Q. When you say winging off, what does that mean, particularly?

A. Well, you see, No. 4 is about—it is about 20 feet wide, the hatch, and I think it is about

20 x 20 or 20 x 30, something like that. Well, you can only land so many loads in the square to make an even floor, and then you have to go out into your wing tiers, and this landing mat weighed, oh, I would say, roughly, a ton a load, just about that, so the only way you can stow your wing tiers is to use snatchblocks and your gear to stow your wing tiers to come out to your square. See, you come like——

Q. Pardon me. Could you draw just a rough cross-section of the hatch, showing what you are describing, showing us how the lines run, and the use of the snatchblocks?

A. Here is the skin of your ship out like this and like that. Now, as you bring your loads into your hatch, this wing out here—here is the square of your hatch—this wing, of course, all has to be stowed.

* * * * * * *

Q. Would you write 'wing' where you have marked those two?

A. Yes (writing). I would say—say we floor off just about four high everytime that you build a floor in here. Here is just about the way your hatch would run here. This is the forward bulkhead and the after one, and this here is the skin of the ship out here, of course (writing). Say that we are starting right on the skin, right on the floor of the ship in the lower hold. You would start in the wing, would be the best, and you would come out maybe, oh, four high, I would say, just roughly, about four high. Well, you keep coming along four high, four high, four high, until you get out to where you can use your gear to load them. In this case here we would bring in on each

side of the shaft alley—I should have put that in down at the bottom of the hold there. The shaft alley runs down the square of the ship.

* * * * * * *

Q. Could you draw a cross-section of the hatch looking fore and aft so you could show us how the runner would go from the gear down to the snatch block in over to the load—in other words, a cross-section as you look forward, we will say?

A. I am not much of an artist, here.

Q. It would have to be on a separate——

A. You want it on a separate one?

Q. Now, is that a plan view you are showing us that you have drawn—in other words, you are looking down on the ship from above in that view?

A. Yes.

Q. Could you slit that ship in half on a piece of paper?

A. This is just the after end of the ship, you see—No. 5 hatch.

Q. Yes.

A. 4.

Q. On this sheet of paper, could you just slice the ship right down the center of No. 4 hatch, showing the hatch opening, and then show how the runner goes?

A. Well, I don't know. I will try. I think about the best way is to show your gear set up the way it is, the way it would be. Here is the square of the hatch, here. Here is your winches here. The booms—I just have to show the way the booms would run out. This one here would run about out like that, and the runner would come in, and this boom over here, of course, is going to be lower. It comes out over the side of the ship.

The runner comes in here, the blacksmith. I don't know how I could show this—that just shows the square of the hatch, and this runner, here—in this case, the port runner—goes back here under her to a snatch block (drawing).

* * * * * * *

Q. Now, Mr. Southerland, the method that you have described and which you have drawn in the two sketches, will you state whether or not that method was being used at any time at No. 4 hatch prior to the accident—in other words, the method of winging out that you have shown us?

A. Oh, yes. We had come up—oh, we must have come up one or two floors, at least.

Q. Now, how was the snatch block fastened, or secured, to the side of the ship, the skin of the ship?

A. Well, see, there is a beam—it is all ribs running down along the side, and we had the snatch block—had a strap through a hole in one of the ribs or beams, whatever they want to call them.

Q. When you say 'strap,' would you tell us what that is? What do you mean by that? Just describe it in words.

A. In this case, it was a short wire strap. It is a strap with two eyes in it, an eye in either end, and, of course, you have the bight through a hold or pad eye or beam clamp—whatever the case may be that you have to use at the time, you know.

Q. Where this work was being done on the vessel, Mr. Southerland, was any gear used except the ship's own gear?

* * * * * * *

A. The cargo gear naturally belonged to the ship—I mean the booms and runners and that sort of stuff. As far as slings and all that stuff, we furnish all of our own slings and that stuff but——

Q. When you say 'we', you mean whom?

A. Ace Tractor Company.

Q. And referring specifically to straps which you have described, will you tell us who furnished those?

A. Well, we furnished—we had a gear man that made the gear, and we had our own wire and gear and all, and we had a shop on the dock where he made this gear.

Q. And would you tell us whether or not the strap which you have described as a part of the gear that you mentioned—in other words, when you say you had a man who made the gear, would that include straps, or not?

A. Yes; all the stuff that we used to work—all the slings, straps, spreaders, and stuff like that was made by our gear man.

Q. Do you have any knowledge as to whether or not a strap and snatch block was being used at the time of Mr. Sides' injury?

A. Oh, yes.

Q. And do you have any knowledge as to whose strap that was?

A. Well, as far as I know, it was ours, but now if someone happened to pick up a strap, I wouldn't —to the best of my knowledge, I would say that it was ours, but I won't swear that I know that it was ours, because you know when they are loading the ship and everything is in a hubbub why if your arm was there and they wanted to use it

they would just put it in a snatch block and use it when they get excited, you know.

Q. Do you recall the name of the man you described as a gear man, who made up this various equipment?

A. No, no more, I wouldn't.

Q. Do you recall having at any time had any difficulty with the man on the dock who was making up this gear for Ace Tractor?

* * * * * * *

A. Well, when we started loading these bundles of landing mat, they use two plugs. They are about—must be about 18 inches long, and there is a wire strap from those two plugs, and they have—they must be about 3 foot long spliced in, and with an eye on the other end that goes on the blacksmith. Well, we were pulling these splices out, and I fired Ace Tractor Company's gear man and put another man in there splicing the wire.

* * * * * * *

Q. Mr. Southerland, do you know who was driving the winches at the time Sides was injured —that is, the winches at the No. 4 hatch?

A. Oh, yes, I know him. I can't think of the name now. It is another thing.

Q. Well, I will ask you, do you recall whether or not it was a man named Bigsley?

A. Yes, Bigley or Bigsley.

Q. Bigsley. Where did you first meet or know Mr. Bigsley?

A. Oh, he was there helping gather the scrap up, I guess, when I got there. I met him there when I came out to load the ship.

Q. And by what company was he employed?

A. He was employed by Ace Tractor Company.

Q. And what word did you give him when you reported to the operation?

A. Well, this Rodney Dean gave him—told me he was a winch driver.

Q. Now, who is Rodney Dean?

A. He is the—he was the expediter, I guess, for Ace Tractor Company.

Q. And by whom was he employed?

A. Ace Tractor Company.

Q. And what did you do with Mr. Bigsley concerning Mr. Dean's comments?

A. I put him on a set of gear.

Q. At any time did you form any conclusion, after observing his work, as to his ability or inability to operate winches? Answer that.

A. Well, he isn't a competent winch driver.

Q. Mr. Southerland, at what time after you reported to the vessel to work did you form any opinion as to Mr. Bigsley's competency or incompetency to drive winches?

A. When he first went to work.

Q. What experience have you, yourself, had in driving winches, Mr. Southerland?

A. About, oh, twelve years, I guess.

Q. And could you tell us just briefly, as laymen, what you, as an experienced winch driver, observed about Mr. Bigsley that permitted you to form a conclusion that he was not competent?

A. Well, I don't know how to explain it to you.

Q. Well, in other words, just what you saw him do and what it meant to you.

A. Well, here is—one way—now, you take a person that has any experience around gear like that—you know that gear is tested for five ton, but it isn't a good idea to take five ton right off

the dock, although it is done lots of times, but someone like him, you could tell him to pick up ten ton with it, and he just has no idea what the gear can do. I mean he is—put it this way: If he was here in the States where you had men, they wouldn't even let him take one load in. When he took one load, that would be the end of him.

Q. Did you have any conversation with the officers of the vessel prior to the accident concerning the incompetency that you observed in Mr. Bigsley?

A. Not that I can recall, no.

Q. From your experience as a winch driver and from observing the operation going on at Amchitka just prior to the accident, could you tell us just whether or not, in your opinion, the officers would have any reason to know that Mr. Bigsley was incompetent? Just 'Yes' or 'No.'

A. No.

* * * * * * *

Q. Assuming, Mr. Southerland, that the landing mats were being winged out, as you described it, by use of a snatch block and a strap on the skin of the ship, and assuming that the strap was not defective in any way, but that as a result of this work the strap did part, would you tell us from your experience as a winch driver what could have caused such an incident?

A. Well, you see, when you are heaving on anything like that that has to be stowed out in the wing, and you are using a snatch block, you just have to barely float it, because you have such poor drift anyway that you are almost pulling against the two runners, and if you try to go too high you

start pulling against the two runners, and something has to carry away. I mean something just has to give if you keep heaving on it.

Q. Is there any particular expression you use by the stevedores for such an action of the runners as you have described?

A. Well, tight-line them.

Q. All right. How soon after you heard the cry which indicated to you that an accident had happened did you arrive at the No. 4 hatch?

A. Oh, within a minute or so.

Q. And at that time, at the time you arrived, did you observe who was on the winches?

A. The winch driver.

Q. And which winch driver?

A. I can't think of his name.

Q. The same one?

A. Yes, the same one.

Q. Bigsley?

A. Yes, Bigsley or Bigley.

Q. How many other winch drivers were working on the vessel other than Mr. Bigsley?

A. Well, there was two winch drivers with each set of gear—that would be two, four, six—that would be seven others besides him."

(Record pp. 55-78.)

Cross-Examination.

* * * * * * *

"Q. Mr. Southerland, when did the ship commence loading scrap at Amchitka prior to this accident to Mr. Sides?

A. It came in prior to—around noon, I believe. We started getting everything ready and started work that afternoon.

Q. The accident happened, then, the day that operations were commenced?

A. No, no.

Q. How many days prior to the accident had the loading operation been under way?

A. Well, I wouldn't say right exactly the day, but I would say it must have been about, oh, maybe five days, something like that.

Q. And during those five days prior to the accident, loading was taking place in all five of the hatches at various times?

A. I believe we had worked all five. See, No. 2 worked steady all the time with sailors, and then the other gangs as we shifted around. Maybe I hadn't went in No. 1 yet. I wouldn't say for sure.

Q. Now, the sailors were loading No. 2 by themselves. Is that correct?

A. Yes. They had no longshoremen there.

Q. And some of the members of the crew of the Edward A. Filene were acting as hatch tenders and winch drivers at No. 2. Is that correct?

A. Well, they had their own winch drivers, yes.

Q. Now, in addition to the sailors working No. 2 hatch, they were also working other hatches in conjunction with the men from the shore that Ace Tractor had brought over to Amchitka. Isn't that correct?

A. We hired everyone we could—I mean for extra men, yes.

Q. And not only did you hire members of the crew, but you also hired officers of the Edward A. Filene to assist in this loading operation. Isn't that correct?

A. You mean like on the watch below or anything—yes.

Q. And particularly the second mate was one who worked down in the holds in the loading operation?

A. Bob White, yes.

Q. And also the chief officer?

A. I don't think that he worked—see, he was on deck all the time. You know what I mean.

Q. In other words, the chief officer was on deck generally supervising the operation at all times, wasn't he?

A. No. No. 2 hatch——

Q. He didn't exercise any supervision or inspect any of the hatches other than No. 2, to your knowledge, before this accident?

A. Oh, they inspected for stowage, yes.

Q. And in addition to the chief officer inspecting for stowage, the master also inspected the hatches other than No. 2, did he not, before the accident?

A. Yes, sir; yes, sir.

Q. Now, do you know whether the chief officer and/or the master received any compensation for those inspections?

A. Well, I wouldn't know about that.

Q. Now, with respect to members of the crew on the Edward A. Filene, who worked in these hatches, other than No. 2, did you have anything to do with approving the time sheets turned in for their work?

A. Yes.

Q. In other words you more or less certified that a particular crew member had worked so

many hours on a particular day. Isn't that correct?

A. Yes.

Q. Do you know how such a crew member was compensated for work in handling cargo in other than No. 2 hatch?

A. Well, I don't remember too well now, but I understood that it went in with the chart or some way—that is, the loading operations—except the extra men who were hired. I think they were paid by check when they went down south, but I wouldn't, you know, I wouldn't say. That is just what I was told, and it has been so long ago that I——

Mr. Blanpied. Indication of pausing.

Q. Now, in connection with the operation of snaking or pulling the lifts in No. 4 in under the wing, a great many slings were used, were they not?

A. Well, no, sir. We weren't using slings. We were using these plugs in these landing mats.

Q. The plugs were used to hold the mats into a bundle. Is that right?

A. No. These mats were bundled up, and then they had a wire around them, and there's holes—I don't know whether you have ever seen that landing mat or not.

Q. Yes, I have.

A. You have?

Q. Yes.

A. Then you understand those holes. Well, those holes line up, and you drop these two plugs right down in through these holes, you see. They are a steel plug about that big around (indicat-

ing). They drop right down through, and then, of course, the strap comes here and binds them.

Q. So that they don't shift when you are putting them in?

A. Yes.

Q. Well, now, you saw, did you not, the strap which parted in No. 4?

A. Yes. I rigged—I was there—it was rigged under my supervision.

Q. You actually rigged that particular sling to which the snatch block was secured?

A. Well, I didn't do the work, but I was there and supervised it.

Q. Well, who actually rigged it?

A. It has been so long ago now—the gang that was in the hold.

Q. Well, was it rigged to a beam, or was it rigged through a pad eye?

A. Well, let's see, now.

Q. If you don't know, just say you don't know.

A. Well, I wouldn't say, now, because that was shifted so many times, you know, right then at the time.

Q. In other words, this strap would be taken out and shifted to perhaps another structural member or to another pad eye on the side of the ship underneath the wing, as necessary from time to time?

A. Yes.

Q. And, of course, you weren't there every time that the strap was shifted, were you? The men in the hold would do the shifting as they deemed necessary. Isn't that true?

A. Well, no. I was there because they were more of a green gang, unless there happened to be someone there that was competent to do it, but as far as—I would say that most of the time I was there.

Q. Well, it is a fair statement, isn't it, that you weren't there every time this strap was taken off and the snatch block moved from one particular spot to another along the frame, the outside frame of the ship?

A. I guess that is true.

Q. Now, as a matter of fact, there were more than one strap similar to the one that parted in No. 4, weren't there?

A. I am not quite—let's see, now. There was more than one strap down there in the hatch.

Q. There was more than one strap in No. 4 of a similar design to the one which parted?

A. Oh, yes.

Q. As a matter of fact, on the ship you had about 100 straps that were similar in design and dimensions and size to the one that parted. Isn't that true?

A. No, I wouldn't say that many of that certain type.

Q. Well, say 50, then.

A. I think even that is a little bit strong. I mean—see, a short wire strap like that isn't—you just don't use them too—you see, we weren't using that on the cargo. If we had been using that on the cargo, then I would say, Yes, that there was that many down in the hold, but there was—I would say there was several of them around. There was on—maybe two or three like that, laying around the hold.

Q. Mr. Southerland, this operation of securing a snatch block underneath a wing to maybe the side of the ship, or to a pad eye along the side of the ship, that is frequently done, isn't it, when you are snaking in cargo from the square into the wings?

A. Yes.

* * * * * * *

Q. Are you familiar with any regulation of the Pacific Maritime Association prohibiting the use of booms when snaking cargo?

A. Up there—there is no prohibitions up in that country, none whatsoever. You do what you think you can get away with up there. I mean under the circumstances—you understand that they hire anybody on those jobs, and they don't understand a ship; they don't understand gear. And you have to get by just the best way you can. I mean up there it isn't like here. They have a lot of practices that you don't follow up north, and every port has different ones.

Q. Well, then, you are familiar with some regulations which frown on the use of standing gear to snake cargo?

A. Personally, I have never run across it, but I won't say that they don't have them, because, like I say, every port they have a little different regulations.

Q. Now, you don't recall, as I understand your testimony on direct, whether this particular strap that parted in No. 4 was rove through a pad eye, or just through one of the apertures in the frame along the skin of the ship. Isn't that correct?

A. Yes. It could have been through a limber hole or—I don't remember now just what it was.

Q. What did you call it—a limber hole?

A. That is what I call them. I think they have other names for them, but that is what I call them.

Q. Well, that is a hole, is it not, that is formed by the meeting of two—well, we will say the rib and one of the overhang beams?

A. Or where there is a hole cut in—they have those holes cut in, you know.

Q. Yes. And, for example, if you have a standing rib, they are designed with holes in them?

A. Yes.

Q. Maybe about three or four inches in the steel plate?

A. Yes.

Q. Now, let me ask you, if you have a strap that is rove through one of these holes, it comes in contact with a relatively sharp edge, does it not?

A. Yes.

Q. And by continued use or by excessive strain, it is possible that the strap will be cut by this—by the side of this aperture through which it is rove. Isn't that true?

A. Yes.

Q. Now, do you know whether or not the chief officer was a winch driver? Let me reframe the question. Perhaps it is not too intelligible. Do you know whether the chief officer of the Edward A. Filene was experienced in running winches of the type that were aboard that vessel?

A. Well, as far as actually being a winch driver, I don't think he was, but I wouldn't——

Q. As a matter of fact, you had seen him run one of those winches, a set of those winches, hadn't you?

A. Not the chief mate, I don't think.

Q. Well, then, it is a fair statement to say you don't know whether he was an experienced winch driver or not?

A. I think that is better.

Q. All right. Well, did you ever see the skipper operate one of the winches on the Edward A. Filene?

A. Yes, I seen the Old Man run one.

Q. Which set of gear was he running when you saw him operate winches?

A. Oh, I think he relieved several of the winch drivers at different times.

Q. You mean several times before this accident happened on board the Filene?

A. He would relieve them for a cup of coffee or something like that, you know.

Q. Was that an east coast or west coast rig that they had those winches on?

A. She was west coast. They had turned the winches and put levers on them—that is, one man operate them.

Q. So that two winches could be operated by a single man standing between them?

A. Yes.

Q. When did you form an opinion that this chap whom you noticed at the winches, at No. 4, right after the accident, was incompetent as a winch driver?

A. Oh, when we first started working cargo.

Q. Would you say two or three days before?

A. Well, whenever we started working cargo —four or five, or whatever it was.

Q. It was quite obvious to you that he didn't know what he was doing?

A. Yes.

Q. But you nevertheless let him go ahead and continued to run his gear?

A. I had no alternative.

* * * * * * *

Q. Now, were all of those winch drivers that were engaged in this loading before the accident, with the exception of this fellow Bigsley, competent winch drivers, in your opinion?

A. Well, I had one fellow before Bigsley I got rid of.

Q. And that was before the accident?

A. Yes.

Q. The rest of them seemed to know what they were about?

A. No, but that is all there was.

Q. You didn't see the accident, did you?

A. No, sir.

Q. You actually don't know what happened down there to cause the accident, do you?

A. No, just from what I seen afterwards, what I surmised, myself. I mean with using a little intelligence it doesn't take much to see what happened.

Q. Now, did you look at this strap that had parted in No. 4 when you arrived there after the accident?

A. Oh, after things had got quieted down and they had got blankets and a stretcher and all for Sides.

Q. It broke, didn't it? The splice didn't pull out. Isn't that correct?

A. It broke.

Q. From your experience with rigging, I take it that you will agree that a properly spliced wire cable will break—assuming that it is in good order—will break before a splice will pull out. Isn't that correct?

A. It should.

Q. The splice is actually stronger than the cable, itself. Isn't that correct?

A. Well, it couldn't be stronger, but it is just as strong as the cable.

Q. Was that ¾-inch wire, or was it ⅝, or do you know?

A. Well, now, I wouldn't say now whether it was ⅝ or what it was, now.

Q. The Edward A. Filene was a Liberty ship, wasn't she?

A. Yes, sir.

Q. What kind of winches did she have?

A. Cog winches.

Q. Steam?

A. Yes.

Q. Did you inspect the winches after the accident to see if they were in good order and condition?

A. I didn't personally inspect them. We started working cargo again as soon as he was out of the hold." (Record pp. 78-96.)

Deposition of Gerald J. Reilly.

"Mr. Blanpied. This is the direct examination of Gerald J. Reilly, being questioned by Mr. Gallagher:

Q. Will you state your name, please?

A. Gerald J. Reilly.

Q. What is your occupation?

A. Captain of the Harry Lundeberg.

Q. You are a Master Mariner?

A. Yes, sir.

Q. How long have you been a Master Mariner?

A. Let's see, nine years.

* * * * * * *

Q. Captain, were you Master of the SS Edward A. Filene in June of 1948?

A. Yes.

Q. Was Calvin Sides a member of the crew of that vessel?

A. Yes.

Q. Was that vessel in Alaska during that month?

A. During that——

Q. During June of 1948?

A. Yes.

Q. During the time that the vessel was there was there any loading of landing mats going on?

A. Yes.

Q. Now, did Calvin Sides sign any Articles for the voyage and for his service aboard that vessel?

A. He signed on at San Francisco as I recall.

Q. For how long was he employed pursuant to those Articles?

A. Do you mean for that one voyage?

Q. Yes, what was the voyage for which he was employed?

A. From San Francisco to Alaska and back to the West Coast port.

Q. Did he at any time sign off the Articles?

A. Not that I know of, because he was in the hospital.

Q. Yes, I understand that, but up to the time that he was injured in Hold No. 4 he had not signed off the Articles?

A. No.

Q. In the loading of these landing mats were any plow wire straps used?

A. Yes.

Q. Do you recall the dimensions of the plow wire straps?

A. Well, it all depended on what you were loading.

Q. For these landing mats, for one load.

A. It is normally 5/8 you use.

Q. Did you know that Calvin Sides was injured?

A. Well, sure.

Q. In what hold was he injured?

A. No. 4.

Q. Did you go into No. 4 hold after he was injured?

A. Yes, sir.

Q. Was he still in there?

A. He was still down in the hold.

Q. Was anything on top of him at that time?

A. I think they had already gotten it out of there when I got down there. They had already lifted it up.

Q. When you got down there was there any plow steel wire in the hold?

A. Winch falls and straps.

Q. Was there any plow steel wire strap which had broken in that hold?

A. Yes.

Q. Did you see that strap?

A. Yes. Do you mean the one they were using?

Q. Yes.

A. Yes.

Q. Did you see a plow steel wire strap which had broken?

A. Yes.

Q. Was there more than one broken plow steel wire strap in that hold at that time?

A. Only the one at that time.

Q. What was the size of that plow steel wire strap?

A. That was a 5/8 strap.

Q. Do you know the breaking point of that type of strap; just answer 'Yes' or 'No'?

A. Yes.

Q. What is the breaking point of that type wire strap if the strap is in good condition?

A. It is around 14 or 15 ton.

Q. Are you also familiar with the safe working load of that particular type of wire strap?

A. Yes.

Q. What is the safe working load of that particular type of plow steel wire strap if it is in good condition?

A. About three tons. It is about a fifth of your breaking strain.

Q. Now, were you familiar with the ship's gear and equipment aboard that ship?

A. What do you mean by that?

Q. Well, did you have a personal knowledge of what part of the ship's gear was being used in the loading of these——

A. Do you mean booms and winch falls and——

Q. Yes.

A. They were all in good shape.

Q. What I am trying to find out is this: Do you know who owned the cargo gear consisting of the winches and booms and the falls?

A. Yes.

Q. Who owned those?

A. The ship.

Q. Did you know who owned the plow steel wire straps that were being used in the loading of Hatch No. 4?

A. Yes.

Q. Who owned those plow steel wire straps?

A. All that gear, all the stevedoring gear was brought on the ship by Ace Tractor.

Q. Would that include all of these steel wire straps?

A. All the steel wire straps, spreaders, and bridles, all that was all their gear.

Q. Was this particular strap that you observed and which had broken a part of the Ace Tractor Company gear?

A. Yes, we didn't have any stevedoring gear at all on the ship.

Q. Now, Captain, have you had experience in operating winches yourself?

A. Yes.

Q. Have you had such experience before this accident in which Mr. Sides was involved?

A. Yes.

Q. Did you actually observe the winch driver named Bigsby or Bigby operating the winch which was involved in Mr. Sides' accident at any time before the accident?

A. Well, I saw him there.

Q. Did he appear to you to be an incompetent winch driver or did he do anything that indicated to you that he was incompetent?

A. Usually the way you tell is when they break down your gear.

Q. So you didn't see him break any of your gear?

A. No.

Q. Nothing broke until the time of this accident?

A. That's right.

Q. Now, did this particular plow steel wire strap which had broken appear to you to be new or old?

A. Well, it had been used but it was a fairly new strap. An old strap would be rusty or you could tell they had been used. They get kinky.

* * * * * * *

Q. Prior to the time this accident happened——

A. What he said there, what do you mean that I didn't know how it was rigged?

Q. Did you know how it was rigged in Hold No. 4?

A. Sure, they had been taking that stuff aboard for a couple of days.

Q. Do you know how it was rigged?

A. Sure.

Q. Will you tell us how it was rigged in Hold No. 4?

A. It was roved through a limber hold in the frame and then they put the snatch block in the two eyes and moused it. Then you reeve your winch fall into that.

Mr. Blanpied. Q. Did you see it rigged in that fashion before this accident happened?

A. Sure, they had been working a couple of days on that gear.

Cross-Examination.

Q. Now, Captain Reilly, you have been discussing this case with Mr. Gallagher before I came in, haven't you?

A. Yes.

Q. Did Mr. Gallagher show you any statements which you previously made or signed concerning this accident?

A. No.

Q. All you have is what——

A. What he was telling me about this thing.

Q. Did Mr. Gallagher read something to you?

A. Well, it is about——

Mr. Gallagher. Then I said, 'This stipulation,' referring to the pre-trial stipulation which I had in my hand.

'About who is responsible' is the witness.

Mr. Wright. The last statement is from the witness.

Mr. Gallagher. Yes.

Mr. Wright. Q. Mr. Gallagher told you who was responsible?

A. No, no, the thing was, who was responsible as far as the equipment and what was in the charter party.

Q. Mr. Gallagher then told you whose strap this was; right?

A. No, he didn't tell me whose strap it was. I know whose strap it was.

Q. All right. Now, Mr. Reilly, the ship had straps, 5/8-inch wire straps identical to the one which you observed broken in No. 4 hatch, didn't it?

A. No.

Q. If I were to tell you that the Chief Officer, Mr. Burgstrom, and you are familiar with him, testified that the ship did have a number of straps identical to the one which we believe was broken in No. 4 hatch, would that change your testimony?

A. No. You said that the ship had straps in No. 4 hatch. Our straps would be in the forepeak or afterpeak locker.

Q. Well, perhaps I didn't make myself clear. It is true, is it not, Captain Reilly, that the ship did have on board wire setups which were similar in appearance and design to the one which you observed broken in No. 4?

A. Right, aboard the vessel, but not in use.

Q. Well, were you in No. 4 hold at the time the cargo was being worked?

A. How could I do that?

Q. You weren't, were you?

A. No.

Q. You did inspect No. 4 as well as the other hatches from time to time in the course of your duties, didn't you?

A. That's right.

Q. You observed how they were carrying out operations?

A. How they were loading?

Q. Yes.

A. Yes.

Q. Now, in addition to your carrying out that duty of inspection, the Chief Officer, Mr. Burgstrom, also did it, didn't he?

A. That's right.

Q. Captain, you actually didn't see the way that the runners were located with relation to the

strap which you state was broken in No. 4 at the time of the accident, did you?

A. Do you mean right at that moment when it happened?

Q. Yes.

A. Well, unless they had changed it. You see, what they had been doing, they would bring in, say, eight or ten loads of two at a time and then they would rig up out in the wings and heave them back out in the wings.

Q. In other words, it was an operation which required a frequent change of the position of this sling, didn't it?

A. Well, no. You just change from bringing the loads into the hold with your bridle, then you drop all in the square, and then they take and put the winch fall—your yardarm fall would go into this block, and you would lift it up, see, and then you would set it in. You slack away on your midships.

Q. Well, then is it a fair statement to say that after a number of loads were landed in the square of the hatch it then became necessary to unhook one of the runners, either the port or the starboard, and from the blacksmith——

A. No, no, you leave it in the blacksmith. You just took the bit and put it in the snatch block.

Q. It is the same thing, you could unhook from the blacksmith and reeve it through the snatch block, but you say they merely opened the snatch block which was secured to the sling and put the runner in when they wanted to float it into the wings; right?

A. You use the same bridles. You don't disconnect anything, take the bit of the wire and put it in the snatch block.

Q. Yes, well, now, that would entail moving the runner, we'll say, distance of perhaps 10, 15 or 20 feet to the wings where you could open the snatch block, put it in and then secure your snatch block again and then knot her in; right?

A. Right.

Q. Now, in addition to the operation of loading it required the position of the sling which was holding the snatch block to be moved from time to time, didn't it?

A. No.

Q. In other words, you could load the entire hatch by keeping the snatch block in the same position?

A. Two straps, there are two straps. One over in the aft end and another strap in the midships there. Those No. 4 hatches have a deep tank in the lower hold which gives you—you don't have the full length of the hatch because you have a deep tank at the fore end so all it entailed was the movement of that twice. You load the aft end first and then you start in the midships.

Q. Well, now, that would permit you to drop the load under the square of the hatch in the place where the sling and block were, isn't that right?

A. Well, you dropped the load in the square of the hatch.

Q. Yes——

A. And when you wanted to float it in to the wing——

Q. And it is your testimony then that the forward and the after slings were never moved during this entire operation; is that your testimony?

A. I don't think so. I wouldn't be positive

due to the fact I wasn't down in the hold all the time.

Q. It is possible they might have changed the position of the sling and moved to another limber hole?

A. It is possible.

Q. Well, then it is possible that this strap was moved from place to place in the hold?

A. Yes, it would be just on the one side. It would be just on the one side because the shaft alley is in between and they take so many loads on the one side and take so many loads on the other side, four men working on each side.

Q. Now, Captain, this limber hold that you have described or spoken of, can you tell us what that is or what it looks like?

A. Well, I can draw a picture of it. That is the side of the ship and this, it is a stiffening plate in there, a hole in there, evidently if there is any strain in there—cut a hole to keep it from going further if there is a break or anything, they have the hole in there. I really couldn't tell you the technical reason but it is an understood fact it is there so if anything would break it wouldn't go any further due to the fact that you have the hole in there.

Q. Let's see, a limber hole is a hole, I take it, about three or four inches in diameter?

A. Yes, about that.

Q. Which is cut in a steel plate which forms one of the vertical members of the ship's structure; isn't that about it?

A. Yes.

Q. Now, the strap is roved through that; isn't that right?

A. Yes.

Q. Now, through use the strap will come in contact with the edge of that limber hole, won't it?

A. That's right.

Q. And that edge is about a quarter of an inch across, isn't it?

A. Well, it all depends on what size the plate is.

Q. Do you recall, on the Edward A. Filene, what the size of the plates were where these limber holes were?

A. Well, it is a standard Liberty ship but I couldn't tell you what the size of the plating is. Maybe 3/8 or 1/2.

Q. Or 1/2-inch?

A. I would say it was a half or maybe a little greater due to the fact that is holding up your tween decks, there, see.

Q. Yes, and that presents a rather sharp surface to anything which is pressing or pulling against the circumference of the limber hole, doesn't it?

A. Yes.

Q. Now, what was the size of the runners which were being used in the gear in No. 4?

A. 5/8, 619.

Q. It is sometimes the practice, isn't it, Captain, when you have used a runner for some length of time to replace it and to use the old runner for making straps?

A. Well, it isn't too prevalent any more except on the steam schooners.

Q. Well, the Edward A. Filene was in effect on the steam schooner trade, wasn't it?

A. No, we were strictly from hunger because none of the fellows had ever been up there before except myself and the Second Mate.

Q. All right. Now, in addition to Mr. Sides in No. 4 there were other members of the crew working there in that hatch, weren't there, at the time of the accident?

A. Yes.

Q. Do you recall how many there were, Captain?

A. Eight.

Q. How long before this accident had you commenced any cargo loading in No. 4?

A. Well, I think that we used to start at 7:00 o'clock and we worked until either 11:00 or 12:00. I think it was 11:00 o'clock.

Q. I mean, is it correct that the loading operations in No. 4 had been going on three days before this accident happened?

A. Oh—got in there on a Sunday. What day was it on? We got in on a Sunday up in Amchitka—what day was it the accident happened?

Q. Well, I don't know, Captain. Do you have any recollection as to about how many days you had been loading cargo in No. 4 before this casualty happened?

A. A couple of days due to the fact we hadn't gotten—it wasn't over that because we hadn't gotten over the top of the shaft alley yet.

Q. Now, Captain, you told us that the strap which you observed to be broken down in No. 4 was the equipment belonging to Ace Tractor?

A. All the stevedore equipment was brought on. We didn't have any actual stevedoring equipment. We did have, like you said, there was wire

straps on the ship, but they weren't used in the actual stevedoring operation. Those straps were for our own use on the ship like, say, you had to overhaul a lifeboat or something.

Q. Yes, but it is a fair statement to say, isn't it, that it is possible that that strap which you observed broken down there might have been the ship's strap?

A. I don't know how it could have been unless they went in the lockers and took it out of there.

Q. It is possible, isn't it, Captain?

A. Well, I guess it is, but it wasn't supposed to be—it wasn't supposed to be used because all the stevedoring equipment was supposed to be brought aboard by Ace Tractor.

Q. Is it a fair statement to say that when you tell us that the strap which you observed broken down there in No. 4 hatch belonged to Ace Tractor, that you make that statement on the basis of what should have been the case?

A. That's right, I'd say that.

* * * * * * *

Redirect Examination.

Q. Captain, you say that the ship did have some plow steel wire straps approximately 5/8 inches in diameter in the forepeak and some other place?

A. In the afterpeak. Well, any ship has had some straps.

Q. But those straps you say were not to be used by the stevedore?

A. Well, usually you keep all your gear rooms locked up when you come in because of the fact people do go around stealing your equipment.

Q. Well, if these people, that is, the Ace Tractor Company people, got a strap which belonged to the ship was that obtained with your consent or permission?

A. No.

Q. And in order to get a strap of that type which actually belonged to the ship would they in effect have to steal it?

That wasn't answered.

Mr. Wright. Q. Well, did you give Ace Tractor Company any permission at any time to use any strap belonging to the ship?

A. No.

Q. You did see this strap which broke down in Hold No. 4?

A. Yes, after the accident.

Q. And from your observation of that strap in the hold can you tell us whether it was or was not part of the ship's equipment?

A. Well, there wasn't any actual markings on the straps, you know. Our straps weren't marked. Neither was theirs.

Q. Well, when you said that the basis of your statement that this broken strap was a strap which belonged to the Ace Tractor Company, which was what should have been the case, what did you mean by that?

A. All the stevedoring equipment that was to be used, and according to the contract, was to be furnished by Ace Tractor Company. The only thing according to the charter party was that we would—our gear would handle five tons, and if I am not mistaken, the jumbo gear was supposed to be for 25 tons. In fact, there was a couple of wires to the effect that there wasn't anything in

the charter party originally about it and I wired Seattle about using the jumbo gear.

Q. Well, did you see Ace Tractor Company equipment being brought aboard the vessel for use in the loading operations?

A. Yes.

Q. Did that equipment include straps which were brought from the dock?

A. That's right.

Q. That is, these particular plow steel wire straps, 5/8 of an inch in diameter?

A. Yes, the particular type of straps.

Q. Yes, the particular type of straps that were being used in Hold No. 4?

A. Yes, they are in various lengths.

Q. Well, regardless of their length, was this strap which broke and which you observed in a broken condition in Hold No. 4 a strap of the kind that was brought aboard by Ace Tractor?

A. Would you give me that again?

(The pending question was read by the reporter.)

A. I would say 'yes.'

Q. Did any person purporting to represent Ace Tractor ask you for permission to use any of the ship's equipment excepting the winches and the cargo falls and booms?

A. Not to my recollection, no.

* * * * * * *

Further recross-examination by Mr. Wright.

Q. Captain Reilly, you didn't personally issue every piece of rope or strap that was used on board the Edward A. Filene, did you?

A. No.

Q. As a matter of fact, the boatswain, the Chief Mate, any of the officers could have gotten

any of the gear out of either the locker in the forepeak or the afterpeak without checking with you or asking your permission?

A. That's right.

Q. Captain, you actually relieved the winchmen during various times of this unloading job?

A. Once in a while.

Q. Up at Amchitka?

A. Yes.

Q. And operated the winches during the relief periods?

A. Yes." (Record pp. 119-142.)

Testimony of Raymond G. Stanbury.

Raymond G. Stanbury, called as a witness on behalf of the respondent, having been first duly sworn, was examined and testified as follows:

"The Clerk. Your name, sir?

The Witness. Raymond G. Stanbury.

Direct Examination.

By Mr. Wright.

Q. Mr. Stanbury, you are an attorney at law, licensed to practice in the State of California, and also admitted to the Bar of this Court, are you not?

A. Yes, I am.

* * * * * * *

Mr. Gallagher. Mr. Stanbury represented Ace Tractor in a suit which was pending in the Superior Court of the State of California, entitled Calvin Sides v. Ace Tractor & Equipment Co.

The Witness. That is right.

* * * * * * *

Q. (By Mr. Wright) I now show you a letter on the letterhead of Cannon & Callister, law offices, dated December 16, 1949, and ask you if you have ever seen that letter.

A. Yes, I have.

Q. And I show you a letter which bears the letterhead of Bogle, Bogle & Gates of Seattle, Washington, dated December 10, 1949, and ask you if that letter, together with its attached sheet on the letterhead of Levinson & Friedman, accompanied the letter which I previously showed you of Cannon & Callister dated December 16, 1949?

A. That is right, it did.

Q. (By Mr. Wright) Mr. Stanbury, I show you another letter dated December 28, 1949, on the letterhead of Murray H. Roberts, dated December 28, 1949, addressed to Parker, Stanbury & Reese, and ask you if you have ever seen that letter before?

A. Yes.

Q. Where?

A. Well, I saw it when it arrived in my office, and I saw it again this morning.

Q. Did you see it on or about the date which it bears, December 28, 1949?

A. Well, somewhere around that time. I got it as a reasonably current letter.

Cross-Examination.

By Mr. Gallagher.

Q. Mr. Stanbury, when you received this letter from Cannon & Callister, with its enclosure, did you on behalf of Ace Tractor & Equipment Co. make any reply to Bogle, Bogle & Gates, or to the Olympic Steamship Co.?

A. I am almost certain I didn't. My file no longer exists, but I have a recollection about it, and my best recollection is that I made no reply to it.

Mr. Gallagher. That is all.

The Court. Were you actively handling the matter at that time?

The Witness. I was, Judge, yes.

* * * * * * *

The Court. The letter approving the settlement, I think, bears Mr. Stanbury's signature.

Mr. Gallagher. Yes, it does.

The Witness. That is right, Judge.

The Court. If I recall the stipulation——

The Witness. That is right, Judge.

The Court. ——from what I understood, you were being brought in for today was to show when Olympic said to Ace, 'You are the guilty party here. You owe Sides so much money. You did us wrong by having negligent, or having unseaworthy equipment negligently managed, operated and controlled,' and so on, that Mr. Stanbury just sat back and said nothing in reply to the accusation.

The Witness. I remember that, and my reasons for that.

Mr. Wright. May I ask a question?

The Court. Yes.

Redirect Examination.

By Mr. Wright.

Q. Mr. Stanbury, you said you recall you did not reply to the letter of Bogle, Bogle & Gates, dated December 10, 1949, which was sent to you by Messrs. Cannon & Callister?

A. That is right.

Q. If you did not, can you tell us why you did not?

The Witness. The letter was written to my client and therefore I did not feel that any answer was necessary, for the sake of courtesy, and I had already written them a letter before, in which I declined, on behalf of the company, any liability.

Recross-Examination.

By Mr. Gallagher.

Q. Mr. Stanbury, the letter you referred to in your last answer is the original of this photostatic copy of a copy dated May 20, 1949, addressed to Messrs. Bogle, Bogle & Gates, Seattle?

A. You mean the answer that I referred to having made previously? That is it (indicating).

Q. When you said you wrote and denied liability, that is the full letter to which you refer?

A. That is it. That is the full letter I referred to." (Record pp. 151-159.)

ARGUMENT.

The Voyage Charter Party provides that "the Vessel will permit the use of Ship's winches and other appropriate gear actually on board." (Respondent's Exhibit B, Part II, 2.(b).)

By the application of the maxims "ejusdem generis" and "expressio unius est exclusio alterius" it is clear that Ace Tractor & Equipment Company was required by the terms of the contract to furnish and

supply all equipment required in the performance of the stevedoring work excepting "winches and other appropriate gear actually on board." Otherwise there would have been no reason to include in the indemnity clause an agreement by Ace Tractor & Equipment Company to indemnify the vessel and its owner "for any damage or expense caused by the act or neglect of the Charterer * * * or from failure of equipment supplied by them."

With reference to the ownership of the wire strap which broke, Appellant makes much of the propositions that Gene Southerland said "I won't *swear* that I know that it was ours" and that Captain Reilly said that his statement that the broken strap in No. 4 hatch belonged to Ace Tractor was made "on the basis of what should have been the case."

Each of these statements has been lifted out of its context by Appellant and has been blown up out of all proportion to reasonable interpretation.

With reference to the isolated excerpt taken from the testimony of Gene Southerland it is obvious that all the witness meant by his expression was that he could not be *absolutely* certain that the particular strap which broke was the property of Ace Tractor & Equipment Company. He explained and limited his particular observation. The entire answer as it appears in the record, but not in the Appellant's opening brief, is as follows:

> "Well, as far as I know, it was ours, but now if someone happened to pick up a strap, I wouldn't—to the best of my knowledge, I would

say that it was ours, but I won't swear that I know it was ours, because you know when they are loading the ship and everything is in a hubbub why if your arm was there and they wanted to use it they would just put it in a snatch block and use it when they get excited, you know."

With reference to the testimony of Captain Reilly, what actually occurred is as follows:

"Q. Now, Captain, you told us that the strap which you observed to be broken down in No. 4 was the equipment belonging to Ace Tractor?

A. All the stevedore equipment was brought on. We didn't have any actual stevedoring equipment. We did have, like you said, there was wire straps on the ship, but they weren't used in the actual stevedoring operation. Those straps were for our own use on the ship like, I say, you have to overhaul a life boat or something.

Q. Yes, but it is a fair statement to say, isn't it, that it is possible that the strap which you observed broken down there might have been the ship's strap?

A. I don't know how it could have been unless they went in the lockers and took it out of there.

Q. It is possible, isn't it, Captain ?

A. Well, I guess it is, but it wasn't supposed to be—it wasn't supposed to be used because all the stevedoring equipment was supposed to be brought aboard by Ace Tractor.

Q. Is it a fair statement to say that when you tell us that the strap which you observed broken down there in No. 4 Hatch belonged to Ace Tractor, that you make that statement on the face of what should have been the case?

A. That's right, I'd say that.

* * * * * * *

Q. Well, did you give Ace Tractor Company any permission at any time to use any strap belonging to the ship?

A. No.

* * * * * * *

Q. Well, when you said that the basis of your statement that this broken strap was a strap which belonged to the Ace Tractor Company, which was what should have been the case, what did you mean by that?

* * * * * * *

A. All the stevedoring equipment that was to be used, *and according to the contract*, was to be furnished by Ace Tractor Company. The only thing according to the Charter Party was that we would—our *gear* would handle five tons, and if I am not mistaken, the jumbo gear was supposed to be for twenty-five tons. In fact there was a couple of wires to the effect that there wasn't anything in the Charter Party originally about it and I wired Seattle about using the jumbo gear.

Q. Well, did you see Ace Tractor Company equipment being brought aboard the vessel for use in the loading operations?

A. Yes.

Q. Did that equipment include straps which were brought from the dock?

A. That's right.

Q. That is these particular plough steel wire straps, 5/8ths of an inch in diameter?

A. Yes, the particular type of straps.

Q. Yes, the particular type of straps that were being used in Hold No. 4?

A. Yes, they are in various lengths.

Q. Well, regardless of their length, was this strap which broke and which you observed in a broken condition in Hold No. 4 a strap of the kind that was brought aboard by Ace Tractor * * *?

A. I would say yes.

Q. Did any person purporting to represent Ace Tractor ask you for permission to use any of the ship's equipment excepting the winches and the cargo falls and booms?

A. Not to my recollection, no."

Appellee will not labor this point but it is quite clear that the first paragraph on page 11 of Appellant's opening brief is not only misleading but inaccurate. Said portion of Appellant's brief is based upon isolated remarks taken out of context and in utter disregard of the whole testimony of the two witnesses upon the same subject matter.

In addition to the provisions of the contract between the parties, the record contains substantive evidence showing that the strap which broke had been supplied by Ace Tractor & Equipment Company. In libelant's Exhibit No. 4, letter of Bogle, Bogle & Gates, dated March 22, 1949, it was stated that the agents, servants and employees of Ace Tractor & Equipment Company "in the course of loading cargo into No. 4 lower hold of the vessel, caused a portion of the gear supplied by (Ace Tractor & Equipment Company) to part." In the answer to this letter, Libelant's Exhibit No. 5, there is no denial of this statement.

Respondent's Exhibit D is another letter written by Bogle, Bogle & Gates to the respondent. It is dated December 10, 1949. In this letter the following statement is made:

> "We might advise that we have available for trial by deposition and in person the various crewmen and Ace Tractor longshoremen who were working in the hold at the time of Sides' injury. These men all state that the particular strap which broke was one supplied by Ace Tractor & Equipment Company * * *"

This letter was transmitted to Raymond G. Stanbury, Esq., of Parker, Stanbury & Reese, by Reed E. Callister, with the following request:

> "Since you are handling this matter, will you kindly make what reply, if any, is necessary to this letter on behalf of the Ace Tractor & Equipment Company."

No reply of any kind was made.

In *In re Estate of Ricks,* 160 Cal. 450, 117 Pac. 532, the Court states as follows:

> "It is claimed that the declaration made by the testatrix at the time of the quarrel—namely: That appellant had told her at the time of the division that contestant had agreed to take no further part of the property, could not be considered by the jury to establish the fact that he had made such a statement or representation to her. This may be conceded as correct. The jury, however, had a right to take into consideration the conduct of the appellant in connection with the statement of the testatrix as an admission on

> his part of the facts stated by her. (See Estate of Snowball, 157 Cal. 311, 107 Pac. 598.) * * * The statement of the testatrix at the time of the quarrel between the brothers,—namely, that Hiram L. Ricks had told her of such an agreement at the time the division was made, was made in his presence. If it was not true it called for a denial by him. As it was not denied, it was only natural to consider it as an admission of the truth of the statement by the only one to be affected by it—an acquiescence in the truth of the fact stated, implied from his conduct in allowing it to go unquestioned."

Appellee suggests that what the Supreme Court of the State of California said, as aforesaid, is applicable to the failure on the part of Ace Tractor & Equipment Company to deny the assertion that the strap which broke was one which had been supplied by it. This is particularly true, in the case at bar, because an experienced lawyer, skilled in the knowledge of the rules of evidence and the effect of silence when something more than silence is required, was employed to make answer to the letters, including the accusatory statements contained therein.

The Appellant complains that "Eye witness testimony or real evidence (e.g., the strap itself) are nowhere in existence." (Appellant's Opening Brief, p. 11.) In view of the fact that the evidence shows that the strap belonged to Ace Tractor & Equipment Company and that it supplied the same for use at the time of the accident, the Appellant is effectively accusing itself of having withheld the evidence. If the

Appellant knows, as its proctor asserts, that the strap is "nowhere in existence" then the Appellant must have knowledge of the fact that the strap was destroyed or thrown away. It is significant that proctor for Appellant did not say that the strap was not produced in evidence. He said it is "nowhere in existence."

A. The evidence is sufficient to show that the strap which broke was an unseaworthy appliance.

Captain Reilly testified that the ship's gear "would handle five tons". (Record, p. 140.)

Gene Southerland stated as follows:

> "* * * you know that gear is tested for five tons, but it isn't a good idea to take five ton right off the dock, although it is done lots of times, but someone like him, you can tell him to pick up ten tons with it, and he just has no idea what the gear can do." (Record, p. 73.)

Captain Reilly testified that the breaking point of the type of wire strap which broke, if the strap is in good condition, is around 14 or 15 tons. (Record p. 123.)

If the ship's gear would handle five tons and was tested for five tons it seems obvious that the wire strap would not have broken, if it had been in good condition, as a result of the amount of strain which could have been applied to it by gear which would handle only five tons and was tested for five tons. The wire strap, in good condition, would not have broken until it was subjected to a tension of fourteen or fifteen tons.

The load of landing mats which was being dragged or pulled from the square of the hatch toward the wing of the hold weighed only 2,000 pounds.

> "If the block was being put to a proper use in a proper manner, as found by the District Judge, it is a logical inference that it would not have broken unless it was defective—that is, unless it was unseaworthy."
>
> *Petterson v. Alaska SS Co.,* 205 Fed. 2d 478, 479.

The same observation is applicable to the strap which broke in the case at bar.

Ace Tractor & Equipment Company expressly agreed to indemnify Olympic Steamship Company for any damage or expense caused by the act or neglect of Ace Tractor & Equipment Company or its agents performing any of its duties in the loading of the Vessel "or from failure of equipment supplied by them." It is clear that there was a failure of equipment, to-wit: the wire strap, supplied by Ace Tractor & Equipment Company. When it parted there was obviously a failure of said strap.

B. There is ample evidence in the record to support the finding that the winch operator was incompetent.

In addition to testimony of Gene Southerland with reference to the winch driver, said testimony having been based upon an opportunity to observe the winch driver for a period of several days, libelant's Exhibit No. 4, letter dated March 22, 1949, contains a direct statement that the parting of the wire strap

"resulted from the negligence of a young and inexperienced winch driver employed by you to operate the winches at this particular hatch.

* * * * * * *

"Our investigation indicates that although the gear and rigging supplied by the ship for your use was in perfect condition, your winch driver caused the gear to become tight-lined, resulting in the breaking of a steel strap in the lower hold."

There is no denial of this accusation in Libelant's Exhibit No. 5, the letter dated May 20, 1949, purportedly prepared as a reply to the said letter of March 22, 1949. There was, therefore, an admission by Ace Tractor & Equipment Company of the accusation that the winch driver was young and inexperienced.

In addition to the testimony of Gene Southerland, the stipulation, Libelant's Exhibit No. 1, after referring to the action for damages which had been commenced by Sides against the Ace Tractor & Equipment Company in the Superior Court of the State of California in and for the County of Los Angeles contains the following language:

". . . the basis of said action being the negligence of the Ace Tractor & Equipment Co., Inc., a corporation, which caused the accident and injuries, as described hereinabove; . . ." (Appendix to Brief of Appellant, p. 180.)

In the case of *Petterson v. Alaska S.S. Co.,* 205 Fed. 2d 478, the Court held that it makes no difference whether defective equipment is brought aboard a vessel by the stevedoring company or is part of the

regular equipment of the vessel. In either event the vessel is unseaworthy. It should also follow that if an incompetent winch driver is brought aboard a vessel it makes no difference whether the winch driver is employed by a stevedoring company or by the owner of the vessel. The presence of such incompetent winch driver results in the conclusion that the vessel is unseaworthy. (*Petterson v. Alaska S.S. Co.,* supra.)

It is suggested on page 26 of the Appellant's opening brief "that if the strap had been rigged through a limber hole it would have come in contact with a relatively sharp surface and that it is possible through continued use or excessive strain for the strap to be cut."

Appellee does not see how this possibility could help the Appellant. The law imposed upon the Appellee a non-delegable duty to supply *and keep in order* the appliances appurtenant to the unloading of the cargo. If the strap became defective by reason of the use to which it was put, such defective condition was the sole proximate result of the acts of Appellant in using and continuing to use the strap until such time as it became weakened by being cut. Certainly this would not excuse the Appellant from its obligation to indemnify appellee.

> "Where a person has become liable with another for harm caused to a third person because of his negligent failure to make safe a dangerous condition of land or chattels, which was created by the misconduct of the other or which, as

between the two, it was the other's duty to make safe, he is entitled to restitution from the other for expenditures properly made in the discharge of such liability, unless after discovery of danger, he acquiesced in the continuation of the condition." (Restatement, Restitution, Sec. 95.)

"A person who, without personal fault, has become subject to tort liability for the unauthorized and wrongful conduct of another, is entitled to indemnity from the other for expenditures properly made in the discharge of such liability." (Restatement, Restitution, Sec. 96.)

There is nothing *transitory* about an incompetent winch driver. An incompetent winch driver is a menace and hazard from the instant he walks aboard a ship until he gets off of it. An injury suffered by a seaman in consequence of the incompetence of a winch driver brought aboard the vessel to operate a winch thereon results in an absolute liability on the part of the ship owner pursuant to the unseaworthiness doctrine. If, as is claimed by the Appellant in its brief, the breaking of the strap could have been caused by "tight-lining" (Appellant's Opening Brief, p. 12) by a young and inexperienced winch driver, there is little room for doubt about the proposition that the injuries suffered by Sides were a proximate result of the incompetence of such winch driver. Appellant is responsible for this as an indemnitor without reference to the express contract of indemnity set forth in the charter party.

CONCLUSION.

Because of the failure of the Appellant to perform its duty to the Court in reference to printing in its brief a full and fair resume of the entire evidence it was necessary for the Appellee to do so. It is clear, when all of the evidence is considered, that there is ample support in the record of all of the material findings of fact.

With reference to the principles of law involved, Appellee could have cited a long list of cases but they all boil down to the concise language used in the Restatement of the Law, Restitution, Sections 95 and 96. It therefore seems unnecessary to burden the Court with a lot of quotations from decisions.

It is respectfully contended that the Appellant has not sustained its burden of showing that the trial Court was in error in the findings of fact, conclusions of law or the final decree and that the judgment should be affirmed.

Dated, Los Angeles, California,
October 29, 1954.

Respectfully submitted,
LASHER B. GALLAGHER,
Proctor for Appellee.

No. 14330.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACE TRACTOR & EQUIPMENT CO., INC.,

Appellant,

vs.

OLYMPIC STEAMSHIP CO., INC.,

Appellee.

REPLY BRIEF OF APPELLANT.

LILLICK, GEARY & MCHOSE,
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TOPICAL INDEX

No. 14330.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ACE TRACTOR & EQUIPMENT CO., INC.,

Appellant,

vs.

OLYMPIC STEAMSHIP CO., INC.,

Appellee.

REPLY BRIEF OF APPELLANT.

It will serve no useful purpose in this reply brief to restate or reargue in detail whether the deposition testimony supports the findings of the District Court. We will, however, discuss briefly some of the salient points of appellee's brief.

I.

The Accusatory Letters.

Considerable reliance is placed by appellee upon a letter addressed by Messrs. Bogle, Bogle & Gates, dated March 22, 1949, to Ace Tractor & Equipment Co., Inc. [Libelant's Ex. 4], and the accusatory statements contained therein. It is interesting to note that this accusatory letter states that the "gear and riggings supplied by the ship for your use was in perfect condition" and that the

accident "was caused by . . . the negligence of a young and inexperienced winch driver employed by you. . . ." There is no claim that the steel strap which parted was in anywise defective. The record shows that this letter was appropriately answered by the attorneys for Ace Tractor & Equipment Co., Inc., in their reply to Messrs. Bogle, Bogle & Gates, dated May 20, 1949 [Libelant's Ex. 5].

With respect to the failure of respondent to reply to Bogle, Bogle & Gates' second accusatory letter dated December 10, 1949 [Libelant's Ex. 6], it is respectfully submitted that no reply need have been made in view of the earlier rejection of the claim [Libelant's Ex. 5]. Indeed it is strange that Messrs. Bogle, Bogle & Gates persisted in communicating directly with Ace Tractor & Equipment Co., Inc., after having been apprised more than seven months previously that appellant was then represented by counsel, Messrs. Parker, Stanbury & Reese.

II.

The Strap Was Not Unseaworthy.

There is no question but that the strap parted. The only positive testimony as to the physical condition of the strap was contained in the testimony of the master, Gerald Reilly, who stated: "Well, it had been used but it was a fairly new strap. An old strap would be rusty or you could tell it had been used. They get kinky" [R. 126]. Obviously, if the strap was cut or subjected to excessive strain it would part, even if it were new and in good condition. The mere parting does not support the finding that it was an unseaworthy appliance.

III.

The Winch-driver's Competency.

Appellee, faced with inability to demonstrate by positive testimony the alleged incompetence of the winch driver, again relies upon inferences sought to be drawn from the accusatory letters of Messrs. Bogle, Bogle & Gates. The fact remains that this winch driver had been operating the gear for some days previous to the casualty and there is no showing aside from the episode which caused the injury to Mr. Calvin Sides which can in anywise be construed as evidencing incompetency. It is submitted that there is no testimony in the record which shows unequivocally how or what caused the parting of the strap.

Conclusion.

The record clearly fails to establish facts sufficient to support a judgment in the first instance in favor of the injured seaman against Olympic and it further fails to eliminate the possibility that Olympic might not have been equally responsible with Ace for said injury. The judgment should be reversed.

Respectfully submitted,

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